No. 18-483	
Title:	**Kristina Box, Commissioner, Indiana Department of Health, et al., Petitioners** **v.** **Planned Parenthood of Indiana and Kentucky, Inc., et al.**
Docketed:	October 16, 2018
Linked with 18A284	
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Numbers:	(17-3163)
Decision Date:	June 25, 2018

DATE	PROCEEDINGS AND ORDERS
Sep 14 2018	Application (18A284) to extend the time to file a petition for a writ of certiorari from September 23, 2018 to October 22, 2018, submitted to Justice Kagan. **Main Document** **Lower Court Orders/Opinions** **Proof of Service**
Sep 19 2018	Application (18A284) granted by Justice Kagan extending the time to file until October 22, 2018.
Oct 12 2018	Petition for a writ of certiorari filed. (Response due November 15, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Oct 23 2018	Motion to extend the time to file a response from November 15, 2018 to December 5, 2018, submitted to The Clerk. filed. **Main Document**
Oct 25 2018	Motion to extend the time to file a response is granted and the time is extended to and including December 5, 2018.
Nov 14 2018	Brief amicus curiae of Association of American Physicians & Surgeons filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Brief amici curiae of Alliance Defending Freedom and the Radiance Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Brief amici curiae of American Center for Law & Justice, et al. filed. (11/20/208) **Main Document** **Proof of Service** **Certificate of Word Count**

Nov 15 2018	Brief amici curiae of Americans United for Life, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Brief amici curiae of Fondation Jerome Lejeune, Saving Down Syndrome, and Down Pride filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Brief amicus curiae of Eagle Forum Educational and Legal Defense Fund, Inc. filed. **Proof of Service** **Certificate of Word Count** **Main Document**
Nov 15 2018	Brief amici curiae of The Restoration Project, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Brief amicus curiae of Susan B. Anthony List filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Brief amici curiae of Pro-Life Legal Defense Fund, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Brief amicus curiae of Beverly McMillan, M.D. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Brief amici curiae of State of Wisconsin, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Brief amicus curiae of CatholicVote.org Education Fund filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Amicus brief of Prolife Center at the University of St. Thomas not accepted for filing. (November 20, 2018)(Corrected version submitted)
Nov 15 2018	Brief amici curiae of Ethics and Religious Liberty Commission of the Southern Baptist Convention, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 19 2018	Amicus brief of American Center for Law & Justice and Parents of Disabled Children not accepted for filing. (November 20, 2018) (Corrected version submitted)
Nov 19 2018	Brief amicus curiae of Prolife Center at the University of St. Thomas filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 04 2018	Brief of respondents Planned Parenthood of Indiana and Kentucky, Inc., et al. in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Dec 18 2018	Reply of petitioners Commissioner of the Indiana State Department of Health, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
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May 28 2019	Petition GRANTED and Judgment REVERSED as to Question 1 presented by the petition. Petition DENIED as to Question 2 presented by the petition. **Opinion** per curiam. (Detached **Opinion**). Justice Sotomayor would deny the petition for a writ of certiorari as to both questions presented. Justice Thomas, concurring. (Detached **Opinion**). Justice Ginsburg, concurring in part and dissenting in part. (Detached **Opinion**).
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No. _____

IN THE
Supreme Court of the United States

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State may require health care facilities to dispose of fetal remains in the same manner as other human remains, *i.e.*, by burial or cremation.

2. Whether a State may prohibit abortions motivated solely by the race, sex, or disability of the fetus and require abortion doctors to inform patients of the prohibition.

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PETITION FOR WRIT OF CERTIORARI

The Commissioner of the Indiana State Department of Health, the Prosecutors of Marion, Lake, Monroe, and Tippecanoe Counties, and the Individual Members of the Medical Licensing Board of Indiana respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit panel opinion, App. 1a, is reported at 888 F.3d 300 (7th Cir. 2018). The order of the United States District Court for the Southern District of Indiana granting Planned Parenthood's motion for summary judgment, App. 48a, is reported at 265 F. Supp. 3d 859 (S.D. Ind. 2017). The district court order granting Planned Parenthood's motion for preliminary injunction, App. 76a, is reported at 194 F. Supp. 3d 818 (S.D. Ind. 2016).

JURISDICTION

A panel of the Seventh Circuit entered judgment on April 19, 2018. App. 1a. Petitioners filed a timely petition for rehearing *en banc*, which the Court of Appeals granted on June 8, 2018. App. 127a. On June 25, 2018, however, the Court of Appeals, owing to the recusal of a judge who had voted for *en banc* rehearing, issued an order vacating *en banc* rehearing and reinstating the panel opinion and judgment. App. 114a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provisions at issue are reprinted in the appendix. App. 131a.

INTRODUCTION AND STATEMENT OF THE CASE

In early 2016, the Indiana General Assembly passed a bill regulating abortion and its aftermath. At issue here are provisions outlawing discriminatory abortions (and requiring that abortion patients be told of that prohibition) and mandating that fetal remains be disposed of the same way as other human remains, *i.e.*, through burial or cremation rather than with medical waste.

The district court enjoined each of these laws, and a panel of the Seventh Circuit affirmed over a partial dissent by Judge Manion, who would have permitted to law governing disposition of fetal remains to go into effect. Because the panel opinion created a circuit conflict on the disposition issue, the defendants asked for *en banc* rehearing, which the Seventh Circuit granted. Several weeks later, however, the court vacated rehearing and reinstated the panel opinion when Judge Scudder, who had voted for *en banc* rehearing, recused himself, leaving the court equally divided.

Notably, the Seventh Circuit's ultimate order denying *en banc* review was accompanied by opinions from two separate minority factions of the court—opinions that help illuminate the cert-worthiness of the issues presented.

First, Chief Judge Wood, joined by Judges Rovner and Hamilton, wrote that she, too, would vote to invalidate the fetal remains provision, but on grounds

other than those given by the panel majority. Where the panel majority thought requiring fetal remains to be treated like other human remains fails the rational-basis test because a fetus is not a person for purposes of the Fourteenth Amendment, Chief Judge Wood would have declared it an undue burden on the right to abortion.

Second, Judge Easterbrook, joined by Judges Sykes, Barrett, and Brennan, would have upheld the fetal remains provision because—as the Eighth Circuit has previously held—the State may act to preserve the human dignity of the fetus notwithstanding its Fourteenth Amendment status. Judge Easterbrook further disagreed that the fetal remains provision imposed an undue burden on the right to abortion. Judge Easterbrook also expressed skepticism that Indiana's "anti-eugenics law" is invalid, as "[n]one of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." App. 122a. Indeed, "[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered." App. 122a. Judge Easterbrook concluded, however, that "[o]nly the Supreme Court can determine the answer." App. 122a–23a.

This extraordinary procedural saga, the multiplicity of irreconcilable judicial opinions the case has generated, the inescapable conflict with the Eighth Circuit that now exists, and the overall national importance of the issues presented all justify Supreme Court review.

I. The Fetal Disposition Provision

The first provision of House Enrolled Act (HEA) 1337 at issue here is the requirement that fetal remains be disposed of the same as the remains of any other human being. The premise of that regulation is that an aborted or miscarried fetus is nothing less than the remains of a partially gestated human and should be treated with the same dignity. When in 2015 an Indiana medical waste disposal company was caught disposing of fetal remains it received from abortion clinics, the legislature decided it was time to ensure that health care facilities treated fetal remains with human dignity. Tony Cook, *Indiana Medical Waste Firm Fined for Handling Fetal Tissue*, Indianapolis Star, Feb. 17, 2016, https://bit.ly/2OnYkCJ.

Accordingly, HEA 1337 alters how health care professionals must handle fetal remains, whether due to abortion or miscarriage. It requires that an abortion clinic or other healthcare facility "having possession of an aborted fetus shall provide for the final disposition of the aborted fetus." Ind. Code § 16-34-3-4(a). The remains "must be interred or cremated," which can include "simultaneous cremation" of aborted fetuses. *Id.* Similar provisions are in place for the disposition of miscarried fetal remains. Indiana Code section 16-21-11-6 provides that "[a] health care facility having possession of a miscarried fetus shall provide for the final disposition of the miscarried fetus. . . . which must be cremated or interred." Alternatively, the pregnant woman may choose to handle the disposition of the fetus herself. *Id.* § 16-34-3-2(a).

II. The Non-Discrimination Provision

The other provision of HEA 1337 at issue here provides that "[a] person may not intentionally perform or attempt to perform an abortion . . . if the person knows that the pregnant woman is seeking" an abortion solely on the basis of the race, sex, or disability of the child. Ind. Code §§ 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8. It requires doctors to inform their patients "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." *Id.* § 16-34-2-1.1(a)(1)(K). The statute exempts cases of lethal fetal anomalies, *id.* § 16-34-4-1(b), defined as "a fetal condition diagnosed before birth that, if the pregnancy results in a live birth, will with reasonable certainty result in the death of the child not more than three (3) months after the child's birth." *Id.* § 16-25-4.5-2.

Over the past decade, technological advances have improved both the accuracy and availability of prenatal testing that screens for Down syndrome and other fetal abnormalities. The use of cell-free DNA testing has greatly expanded the availability of prenatal testing during the first trimester. Today, due to these advances in non-invasive testing, the American Congress of Obstetricians and Gynecologists (ACOG) recommends that *every* pregnant woman undergo testing for Down syndrome regardless of her age. Many women rely on screening tests to make decisions about abortion, and the general consensus is that the abortion rate for fetuses with Down syndrome is very

high. *See* Jaime L. Natoli et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995–2011)*, 32 Prenatal Diagnosis 142, 150 (Feb. 2012) (reviewing the published literature on termination of pregnancies after a diagnosis of Down syndrome and finding 67% termination rate in population-based studies, 85% in hospital-based studies, and 50% in anomaly-based studies).

Moreover, physician pressure to abort an abnormal fetus is common. One Indiana woman described feeling "bullied" by her doctor when informed that her baby was at high risk for several genetic conditions, with the doctor telling her that "the baby is in pain and dying," that she "should get an abortion," and that "the best thing that [she] could do as a mother was abort." Appellants' App. 93. Another Indiana woman was pressured to have amniocentesis in her 19th week of pregnancy after an ultrasound showed that one of the twins she was carrying had an enlarged head. She "realized that the doctor was really saying that our baby had a disability and we need[ed] the amniocentesis that day so we could terminate our pregnancy before I reached the 20th week of pregnancy." Appellants' App. 97.

The Indiana legislature responded to the alarming trend of disability-selective abortions by enacting the fetal disposition provision, which prohibits such discriminatory abortions. The primary enforcement mechanism is the requirement that doctors inform women that Indiana does not allow abortions performed solely on the basis of the race, sex, or disability of the fetus. *See* Ind. Code § 16-34-2-1.1(a)(1)(K).

III. The Decisions Below

1. Planned Parenthood brought suit in the Southern District of Indiana seeking a declaratory judgment that HEA 1337 is unconstitutional. After first issuing a preliminary injunction against both the fetal remains disposition statute and the discriminatory abortion statute, App. 113a, the district court, on cross-motions for summary judgment, issued a permanent injunction "prohibiting the State from enforcing the following provisions of HEA 1337: the anti-discrimination provisions, Indiana Code §§ 16-34-4-4, 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8, the information dissemination provision, Indiana Code § 16-34-2-1.1(a)(1)(K), and the fetal tissue disposition provisions." App. 74a.

The district court invalidated the fetal tissue disposition provision under the rational-basis test, concluding that the State's asserted interest in treating fetal remains the same as other human remains was not legitimate because the Supreme Court has held that, for purposes of the Fourteenth Amendment, a fetus is not a person. App. 69a. It also invalidated both the anti-discrimination provision and related physician-disclosure provision in view of "well-established law that precludes a state from prohibiting a woman from electing to terminate a pregnancy prior to fetal viability." App. 74a. "Given the categorical nature" of the abortion right, "any type of outright ban

on pre-viability abortions is unconstitutional." App. 60a–61a.[1]

2. The Seventh Circuit affirmed 2–1 on the fetal remains statute and 3–0 on the anti-discrimination statute.

As to the fetal disposition provisions, the majority opinion acknowledged that the provisions do not affect a fundamental right, but concluded that they are nevertheless unconstitutional for essentially the same reason articulated by the district court—because a fetus is not a person under the Fourteenth Amendment. It said that under *Roe v. Wade*, 410 U.S. 113 (1973), "the law does not recognize that an aborted fetus is a person," such that "the State's interest in requiring abortion providers to dispose of aborted fetuses in the same manner as human remains is not legitimate." App. 16a. The panel distinguished *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990), because "while Minnesota focused on the interest of the *public*, Indiana focuses on the interest of the *fetus*." App. 18a (emphasis in original). The majority also considered it un-

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[1] Following the district court's initial entry of final judgment, the parties filed a Joint Motion to Alter or Amend Judgment urging the court to clarify whether it intended also to enjoin enforcement of the fetal tissue disposition provisions pertaining to miscarriages and requesting that the Court clarify that its judgment and injunction apply only to *pre-viability* abortions and miscarriages. Appellants' App. 310–14. The district court granted the motion, *id.* at 315–16, so that the final judgment enjoined all of the fetal tissue disposition provisions as applied to pre-viability abortions and miscarriages only.

constitutionally irrational for the State to impose fetal-disposition regulations on healthcare providers while affording the mother of an aborted or miscarried fetus the right to dispose of the fetal remains without restriction. App. 18a–19a. Finally, it concluded that permitting simultaneous cremation of fetal remains, but not the remains of born-alive humans, is an unconstitutionally irrational means of advancing the government's stated interest. App. 19a.

With respect to the non-discrimination provision, the majority said that the statute violates a woman's Fourteenth Amendment right to terminate her pregnancy prior to viability. Because the non-discrimination provision is an "absolute prohibition[] on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State," it is "therefore, unconstitutional." App. 11a. The court rejected the State's theory that *Casey* protects only a woman's binary choice whether or not to have a child (not a choice of which child to have) because "[n]othing in the Fourteenth Amendment or Supreme Court precedent allows the State to invade this privacy realm to examine the underlying basis for a woman's decision to terminate her pregnancy prior to viability." App. 13a.

In a separate opinion, Judge Manion concurred in the judgment with respect to the non-discrimination provisions because "Supreme Court precedent compels us to invalidate Indiana's attempt to protect unborn children from being aborted solely because of their race, sex, or disability." App. 21a. But he argued that this "absurd result" "reveals two major flaws of

the *Casey* analysis." App. 24a. First, Judge Manion argued, "*Casey* treats abortion as a super-right, more sacrosanct even than the enumerated rights in the Bill of Rights." App. 24a. Second, *Casey* "replaced strict scrutiny with an effects-based test that is actually *more difficult* to satisfy in many cases." App. 24a (emphasis in original). For these reasons, Judge Manion "reluctantly concur[red] in the court's judgment" because he had "no choice but to follow Supreme Court precedent," App. 36a, yet urged the Court to ameliorate this extreme outcome dictated by its precedents, App. 24a.

However, Judge Manion dissented from the decision that the fetal disposition provision also violates the Constitution. In his view, the remains-disposition statute "rationally advances Indiana's interests in protecting public sensibilities and recognizing the dignity and humanity of the unborn." App. 22a. Judge Manion argued that "[t]he court err[ed] in several respects." App. 37a. First, the panel's decision conflicts with the Eighth Circuit's decision in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990), which "upheld a substantially similar Minnesota law." App. 37a. Second, "the court adopts Planned Parenthood's red herring argument that Indiana cannot require fetal remains be disposed with dignity because unborn children are not persons under the Fourteenth Amendment." App. 37a–38a. Third, "the court departs from traditional rational basis review and requires far too close a fit between means and ends." App. 38a. Finally, Judge Manion

concluded that the panel's errors combined to "produce a result that would never happen in any context but abortion." App. 38a.

3. In view of the conflict with the Eighth Circuit, the State petitioned for rehearing *en banc* on the remains-disposition issue, which the Seventh Circuit granted on June 8, 2018. But two weeks later the court reversed itself and denied the petition when Judge Scudder recused himself and the votes for rehearing *en banc* were no longer present. App. 114a–15a. The result is that the panel decision was reinstated by an equally divided court, with Judges Easterbrook, Kanne, Sykes, Barrett, and Brennan voting to grant rehearing *en banc*.

Chief Judge Wood, joined by Judges Rovner and Hamilton, issued an opinion concurring with the court's decision to deny the petition, arguing that the undue-burden test, rather than the rational-basis test, should have been applied to the fetal disposition provision, even though Planned Parenthood conceded that rational-basis review was applicable. App. 117a. Because "[t]he disposal of an aborted (or miscarried) fetus is just the final step in the overall process of terminating (or losing) a pregnancy," Chief Judge Wood argued, "[i]t thus implicates an interest with heightened constitutional protection." *Id.* Under the undue burden test, she said, the court would need to explore the costs imposed by the fetal disposition provision on women. These costs include "not only a higher out-of-pocket dollar price for the procedure," but also "psychological trauma that chills women from seeking abortions or medical care in relation to miscarriages

because of the potential stigmatizing impact of these measures" and "how the disposal statute might work in tandem with other regulations in a way that unduly burdens the right to choose." App. 120a. Without further development of the record, Chief Judge Wood concluded, it would be "a waste of this court's resources to accept a case for *en banc* review." *Id.*

Judge Easterbrook, joined by Judges Sykes, Barrett, and Brennan, issued an opinion dissenting from the denial of rehearing *en banc*, arguing in support of full-court review of the fetal disposition provision and recommending cert on the discriminatory abortion ban. App. 121a. With respect to the latter, Judge Easterbrook expressed skepticism with the panel's conclusion "because *Casey* did not consider the validity of an anti-eugenics law." App. 121a. Because "[w]e ought not impute to the Justices decisions they have not made about problems they have not faced[,] . . . [o]nly the Supreme Court can determine the answer." App. 122a–23a.

Turning to the fetal-disposition issue, Judge Easterbrook opined that "[t]he panel has held invalid a statute that would be sustained had it concerned the remains of cats or gerbils." App. 123a. He also underscored the conflict with the Eight Circuit's decision in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). App. 124a. In Judge Easterbrook's view, "rehearing en banc is preferable to a constitutional decision preventing Indiana from implementing a law materially the same as one that has been held valid, and operates daily, elsewhere in the nation." App. 125a.

REASONS FOR GRANTING THE PETITION

This case concerns the ability of the State to prevent prenatal discrimination on the basis of race, sex, and disability and to preserve the dignity of fetal remains by ensuring that they are disposed of in the same manner as other human remains. The fetal disposition provision expands on long-established legal and cultural traditions of recognizing the dignity and humanity of the fetus. The non-discrimination provision, on the other hand, is a qualitatively new type of abortion statute that responds to new technological developments allowing women to make a choice not contemplated at the time of *Roe v. Wade*, 410 U.S. 113 (1973), or *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992): the choice of *which* child to bear. Indiana urges the Court to determine whether it may so advance these interests consistent with the Fourteenth Amendment.

I. The Court Should Resolve the Circuit Conflict over the Nationally Important Question Whether States May Require Fetal Remains To Be Handled the Same as Other Human Remains

A. The decision below conflicts with the Eighth Circuit's decision upholding an identical requirement in Minnesota

1. As the dissenting opinions of both Judge Manion and Judge Easterbrook (joined by Judges Sykes, Barrett, and Brennan) recognized, the Seventh Cir-

cuit panel majority, in striking down the fetal disposition provision, created a conflict with the Eighth Circuit's holding in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). *See* App. 39a-40a & n. 11 (Manion, J., concurring in the judgment in part and dissenting in part); App. 124a (Easterbrook, J., dissenting from denial of rehearing *en banc*).

There, the Eighth Circuit upheld a fetal disposition statute "substantially similar in every material respect" to the Indiana law struck down by the Seventh Circuit here. App. 39a (Manion, J., dissenting). Like the Indiana law, the Minnesota law required healthcare providers either to cremate or bury aborted and miscarried fetal remains and exempted women who have miscarriages at home and choose to dispose of the fetal remains themselves. *See Planned Parenthood of Minn.*, 910 F.2d at 488; *see also* Minn. Stat. § 145.1621(3) (applying only to abortions or miscarriages occurring "at a hospital, clinic, or medical facility"). Also like the Indiana law, Minnesota allows for simultaneous cremation of multiple fetuses. *See Planned Parenthood of Minn.*, 910 F.2d at 484; *see also* Minn. Stat. § 145.1621 (making no restriction on group disposal methods).

Applying the rational-basis test, the Eighth Circuit held that requiring that fetal remains be treated the same as human remains is valid. *Planned Parenthood of Minn.*, 910 F.2d at 487. While the Seventh Circuit held that "the State's interest in requiring abortion providers to dispose of aborted fetuses in

the same manner as human remains is not legitimate," App. 16a, the Eighth Circuit said that, even assuming the statute's purpose was to equate fetal remains with human remains, "we do not find it to be an invalid purpose," *Planned Parenthood of Minn.*, 910 F.2d at 487.

And where the Seventh Circuit held that it was irrational for Indiana to exclude individual women from the burial/cremation requirement, the Eighth Circuit held that "given the privacy concerns implicit in activity in one's home," the State had not acted irrationally by regulating the disposal of fetal remains by hospitals and clinics but not by women who miscarry at home. *Id.* at 488.

The five dissenting votes below underscore how these decisions are fundamentally irreconcilable. Judge Manion pointed out in his dissent that "[t]he Indiana and Minnesota laws are substantially similar in every material respect," and "the same state interest is involved in both cases." App. 39a–40a. Similarly, Judge Easterbrook argued that the panel's attempt to distinguish *Planned Parenthood of Minnesota* is unconvincing because "the intent behind a law does not affect rational-basis analysis." App. 124a. He also observed that "to deny that public sensibilities can matter (as the panel did) creates a conflict with decisions in many circuits, on subjects ranging from animal welfare to aesthetic zoning to obscenity." App. 124a.

On the issue of fetal remains alone, Indiana and Minnesota are far from the only States with regulations requiring humane treatment. At least six other States have fetal disposition regulations. *See* Ark. Code Ann. § 20-17-801; La. Rev. Stat. Ann. § 1191.2; N.C. Gen. Stat. § 130A-131.10; Ohio Rev. Code Ann. § 3701.341; Okla. Stat. tit. 63, § 1-301.10; Tex. Health & Safety § 697.004. Accordingly, not only does the panel's decision "prevent Indiana from implementing a law materially the same as one that has been held valid, and operates daily, elsewhere in the nation," App. 125a, but it also crystalizes for the Court an issue that is important across the country.

2. The Seventh Circuit itself is sharply divided over the fetal remains issue. Even the Seventh Circuit judges supporting the panel majority's conclusion disagree as to why the fetal disposition statute is invalid. And while intra-circuit fragmentation may not justify certiorari in many cases, where, as here, it has led to facial invalidation of an important state law, under circumstances where a fully constituted en banc court is unlikely ever to have a chance to resolve internal tensions, the Court should exercise its discretion to provide a forum for final review of a sovereign State's constitutional defenses.

As described above, the panel majority, consisting of Senior Judge Bauer and Judge Flaum, invalidated the Indiana law using the rational-basis test. App. 19a. Critically, however, in her opinion concurring in the denial of *en banc* review, Chief Judge Wood, joined by Judges Rovner and Hamilton, wrote that the fetal disposition provision should instead be held to the

more exacting undue burden test that applies to regulations of the abortion procedure itself. *See* App. 117a. In her opinion, "[t]his case involves a fundamental right" even though "the disposal statute operates at the end of the procedure." App. 117a–18a.

So as things stand, Indiana is barred from enforcing the fetal disposition provision because it supposedly violates the rational-basis test, even though perhaps a majority of Seventh Circuit judges in regular active service, plus Judge Manion, may disagree with that holding, and indeed, only one judge in regular active service—Judge Flaum—is on record supporting both the use of that legal standard and the outcome the panel majority reached. Furthermore, given that Indiana is barred by a final judgment and injunction from enforcing the fetal disposition provision, it will be unable to litigate the validity of the statute in another case where Judge Scudder will not be recused.

In short, on this issue, Indiana is dead in the water with substantial doubt about what the full Seventh Circuit thinks. Under these circumstances, only this Court can ensure that Indiana is afforded a full and fair opportunity to make its case. The conflict with the Eighth Circuit, the equal division of the Seventh Circuit on the outcome of the case, and the additional factions even among those supporting the outcome, amply justify Supreme Court review.

B. The fetal remains provision is valid

The panel majority held the State cannot "mak[e] a moral and scientific judgment *that a fetus is a human being*," App. 15a (internal quotation marks omitted) (emphasis by the Court), because in *Roe* this Court "concluded that 'the word 'person,' as used in the Fourteenth Amendment, does not include the unborn,'" App. 15a (quoting *Roe v. Wade*, 410 U.S. 113, 158 (1973)). And, "[s]ince the law does not recognize the fetus as a person that is simply not a legitimate interest." App. 18a.

This conclusion is a patent *non sequitur*; simply because a fetus is not a person within the meaning of the Fourteenth Amendment does not mean that a fetus is not morally and scientifically human. And because the Indiana legislature reasonably concluded that a fetus is morally and scientifically human, the State is well within its power to ensure that aborted and miscarried fetuses are treated with human dignity, as long as the State does not infringe upon the right to abortion. *See* App. 40a–41a (Manion, J., dissenting).

The government has important interests in protecting fetal life. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) ("The *Roe* Court recognized the State's 'important and legitimate interest in protecting the potentiality of human life.'" (quoting *Roe*, 410 U.S. at 162)); *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("[A central premise of *Casey* is] that the government has a legitimate and substantial interest in preserving and promoting fetal life.").

These interests arise because a human fetus alone has the potential to become a unique and independent human person. The same concern for the dignity of what was once a human life underlies the Fetal Disposition Provision. Only fetal remains once had the potential to grow into a fully formed, mature person. Requiring distinctive treatment of fetal remains is therefore a legitimate judgment that the State may carry into effect, so long as it does not interfere with the right to abortion.

Moreover, even disposition of non-human remains are within the regulatory authority of the State. *See* App. 123a (Easterbrook, J., dissenting). Courts routinely uphold statutes aimed at protecting public sensibilities by protecting animal welfare. *Id.* For instance, in *Cavel International, Inc. v. Madigan*, 500 F.3d 551 (7th Cir.), the Seventh Circuit upheld, on animal welfare grounds, an Illinois statute prohibiting the slaughter of horses for human consumption. App. 123a. If "reducing dismay at poor treatment" of horses is a legitimate government interest, *see* 500 F.3d at 557, then so too is respecting the dignity of fetal remains—or (put another way) reducing dismay at the lack of such respect. App. 123a.

Nor is any imperfect fit between the statute's means and ends fatal. The panel majority held that the Fetal Disposition Provision fails to advance the cause of protecting human dignity because: (1) "it allows a woman full liberty to dispose of the fetus without restriction," and (2) it "continues to allow for mass cremation of fetuses." App. 19a. That reasoning is deeply flawed. As Judge Manion put it, the panel in

effect "objects that the provision is irrational because it doesn't treat unborn children as human enough." App. 42a (Manion, J., dissenting). However, grading the homework of the Indiana General Assembly in this manner "is not how rational basis review works." *Id.*

The Indiana legislature could rationally conclude that fetal remains should be buried or cremated separately from mere medical waste because they are distinct human beings, yet also conclude that differences from adult human remains justify mass cremation. It could also rationally conclude that the sensitive nature of abortion and miscarriage justifies releasing fetal remains to the mother upon request. Needless to say, by permitting aggregation of fetal remains for cremation, the statute moderates the costs it might otherwise impose on abortion providers. It would be odd to say that the statute is unconstitutional because it does not burden Planned Parenthood enough. In any event, the State may pursue like treatment of fetal and other human remains without achieving that perfect result in all ways or in all circumstances.

In concluding that the fetal disposition provision fails rational basis because it does not line up precisely with cremation and burial requirements for adult humans, *see* App. 18a–19a, the panel majority "departs from traditional rational basis review" by "requir[ing] far too close a fit between means and ends." App. 38a (Manion, J., dissenting). Critically, as Judge Manion recognized, the Seventh Circuit has "produce[d] a result that would never happen in any

context but abortion." App. 38a (Manion, J., dissenting).

II. Whether States May Preclude Discriminatory Abortion Based on the Race, Sex, or Disability of the Fetus (Including Down Syndrome) Is a Nationally Important Question Worthy of Immediate Consideration

In his dissent from denial of rehearing *en banc*, Judge Easterbrook expressed substantial skepticism that the fate of Indiana's non-discrimination statute is controlled by *Roe* and *Casey*. Yet he was "content to leave [the non-discrimination issue] to the Supreme Court" because only "the Justices can speak authoritatively." App. 123a. The Court should accept this invitation to provide guidance on what is already a burning national issue.

A. States need to address the newly emergent threat of abortions targeting the race, sex, and disability of the fetus, and the stakes are too high to await further percolation

Estimates show that at least 30% of fetuses diagnosed with Down syndrome were aborted even before the development of non-invasive genetic screening in 2011. Gert de Graaf et al., *Estimates of the Live Births, Natural Losses, and Elective Terminations with Down Syndrome in the United States*, 167A Am. J. Med. Ethics 756, 758 (2015). With new technological developments such as cell-free DNA testing, the

number of fetuses even possibly having Down syndrome that are aborted will likely rise even more. Brian G. Skotko, *With New Prenatal Testing, Will Babies with Down Syndrome Slowly Disappear?*, 94 Disease in Childhood 823, 824 (2009). According to Planned Parenthood's own medical director, Dr. John Stutsman, approximately half of all babies with Down syndrome are aborted. Appellants' App. 70. And positive DNA screens frequently lead doctors to encourage or even pressure women to terminate the pregnancy. Brian G. Skotko, *supra*, at 825.

As Judge Manion stated in dissent, "Nobody would dispute that Indiana has a compelling interest in protecting mixed-race children, women, and disabled individuals from discrimination. That the developing human lives Indiana seeks to protect are pre-born shouldn't change that." App. 31a. Yet "[p]ermitting women who otherwise want to bear a child to choose abortion because the child has Down syndrome perpetuates the odious view that some lives are worth more than others." App. 32a–33a (Manion, J., dissenting).

As genetic testing becomes more widely available and selective terminations of fetuses with disability diagnoses become more common, individuals already living with these same disabilities will no doubt receive the demeaning and stigmatizing message that they are not valued as productive members of society with equal human dignity. Recently, a man with Down syndrome testified on this issue before the House Subcommittee on Labor, Health, and Human

Services, saying that "the people pushing that particular 'final solution' are saying that people like me should not exist." *Down Syndrome: Update on the State of the Science and Potential for Discoveries Across Other Major Diseases Hearing Before Subcomm. on Labor, Health and Human Servs., and Educ. of the H. Comm. on Appropriations*, 163rd Cong. (2017) (statement of Frank Stephens, Quincy Jones Advocate, Global Down Syndrome Foundation, Board Member, Special Olympics Virginia), *available at* https://bit.ly/2QKIpLg.

Even some who support broad abortion rights have recognized the problem of using widely available genetic testing to abort babies with undesirable characteristics. One article noted the potential conflict between abortion rights and disability rights, acknowledging that "[i]t's also easy to be firmly pro-choice, and also unsettled by the termination numbers and the language of eradication." *See* Ruth Graham, *Choosing Life with Down Syndrome*, Slate, May 31, 2018, https://bit.ly/2A7n3Ct. Another author argued that while abortion should remain legal for any reason, disability-selective abortions are not "any different from leaving deformed children to the wolves[.]" Tim J. McGuire, *Aborting Fetuses with Down Syndrome Should Be Legal. But It's Still Wrong.*, The Washington Post, Mar. 30, 2018, https://wapo.st/2yH5zLl.

Sex-selective abortions, too, are becoming a greater concern. In the United States, the male-to-female birth ratio has climbed sharply in the last twenty years for some demographic groups. Kelsey

Harkness, *Sex Selection Abortions Are Rife in the U.S.*, Newsweek, Apr. 14, 2016, https://bit.ly/21Q0AfK. And in the UK, a recent investigation found thousands of British women in an online forum discussing how to use genetic testing to abort a fetus of the "wrong" sex. Amber Haque, *Labour Calls for Ban on Early Foetus Sex Test*, BBC News, Sept. 17, 2018, https://bbc.in/2QMHgD7.

HEA 1337 responds to these growing concerns and advances the interests in protecting human life articulated in *Roe* and *Casey* by protecting children with Down syndrome and other disfavored characteristics from invidious discrimination.

This concern is resonating across the country. As Judge Manion pointed out, "[o]ther states have followed Indiana's lead, so this particular issue is not going away." App. 31a n.4. Eight additional States currently have sex-selective abortion bans on the books. *See* Ariz. Rev. Stat. Ann. § 13-3603.02; Ark. Code Ann. § 20-16-1904 (eff. Jan. 1, 2018); Kan. Stat. Ann. § 65-6726; N.C. Gen. Stat. § 90-21.121; N.D. Cent. Code § 14-02.1-04.1; Okla. Stat. tit. 63, § 1-731.2; 18 Pa. Cons. Stat. § 3204; S.D. Codified Laws § 34-23A-64. Arizona's law also bans abortions on the basis of race. *See* Ariz. Rev. Stat. Ann. § 13-3603.02. Three States ban abortions on the basis on genetic abnormality. *See* La. Rev. Stat. Ann. § 40:1061.1.2; N.D. Cent. Code § 14-02.1-04.1; Ohio Rev. Code Ann. § 2919.10. Ohio's Down syndrome abortion ban is currently pending at the Sixth Circuit. *See Preterm-Cleveland v. Himes*, No. 18-3329 (6th Cir. filed Apr. 12, 2018).

Laws banning discriminatory abortion proliferate as the genetic-testing technology that necessitates them becomes cheaper and more widely available. That same dynamic heightens the urgency of Supreme Court review now rather than later. If the Court demurs, perhaps to wait years and years for a circuit conflict that may never come, then long before the Court takes up the matter the Nation may go the way of many European countries, where fewer and fewer babies with Down syndrome make it to term each year. In Iceland, the abortion rate for Down syndrome babies approaches 100%, with only one or two born each year—and those few only because, as an Icelandic prenatal physician observed, "we didn't find them in our screening." Dave Maclean, *Iceland Close to Becoming First Country Where No Down's Syndrome Children Are Born*, Independent, Aug. 16, 2017, https://ind.pn/2OnbGis. Reportedly, the abortion rate for Down syndrome babies is 98% in Denmark, 90% in the UK, and 77% in France. George Will, *The Real Down Syndrome 'Problem'*, National Review, Mar. 15, 2018, https://bit.ly/2tRXnZm.

The Court should act now, so that States willing to stop such eugenic manipulation will know whether they have leeway to do so.

B. The non-discrimination provision does not interfere with the right protected by *Roe* and *Casey*

The decision below held that the non-discrimination provision violates *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), as

a pre-viability prohibition on the decision of women who wish to have discriminatory abortions to make the ultimate decision whether to terminate their pregnancies. The panel majority and Chief Judge Wood's concurrence to the court's denial of rehearing *en banc* share this view. *See* App. 10a–11a ("The non-discrimination provisions clearly violate this well-established Supreme Court precedent, and are therefore, unconstitutional."); App. 116a ("The state has not asked for rehearing *en banc* of the panel's ruling on the Sex Selective and Disability Abortion Ban . . . and the reason why is obvious: only the U.S. Supreme Court has the power to decide whether to change the rule of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.").

But the Court has not defined the abortion right that broadly. In *Casey*, the Court upheld what it considered to be the central premise of *Roe*: the woman's right, before viability, to make the choice whether or not to have a child. 505 U.S. at 871. Critically, it spoke of the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision *whether to bear or beget a child*." *Id.* at 896 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). In other words, "th[e] dimension of personal liberty that *Roe* sought to protect" was a woman's ability to choose to have an abortion "when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant." *Id.* at 853.

Thus, the right protected by *Roe* and *Casey* is dualistic: a woman may choose, free of governmental coercion, to bear, or not to bear, a child. Courts have, therefore, invalidated laws targeting that *binary* choice prior to fetal viability. *See, e.g.*, *MKB Management Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (statute prohibiting abortion where the fetus has a detectable heartbeat); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (statute prohibiting abortions of fetuses of at least 20 weeks gestational age, regardless of fetal viability); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (statute prohibiting abortions after 12 weeks of gestation if a heartbeat has been detected); *Isaacson v. Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013) (statute prohibiting non-emergency abortions of fetus of at least 20 weeks of gestational age); *Jane L. v. Bangerter*, 102 F.3d 1112, 1118 (10th Cir. 1996) (statute limiting abortions after 20 weeks gestational age); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1371–74 (9th Cir. 1992) (statute prohibiting non-emergency abortions).

But until this case no court has ever extended *Roe* and *Casey* to the decision of a woman otherwise willing to bear a child to terminate her pregnancy because she finds a *particular* child unacceptable—*i.e.*, to the decision of *which* child to bear. *See* App. 122a (Easterbrook, J., dissenting). Indeed, *Roe* specifically disavows "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and *for whatever reason* she alone chooses." 410 U.S. at 153 (emphasis added). Ac-

cordingly, it was entirely reasonable for Judge Easterbrook to point out that "[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered." App. 122a (Easterbrook, J., dissenting). More particularly, Judge Easterbook observed, "[n]one of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." App. 122a.

To the contrary, in *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007), the Court already permitted a ban on one particular "type of abortion" that "implicates additional ethical and moral concerns that justify a special prohibition." Whereas *Gonzales* approved banning a particular *method* of abortion, Indiana's anti-discrimination law bans particular *reasons* for abortion. Indiana's anti-eugenics law does not attempt to replace viability with some other temporal re-definition of the right not "to bear or beget a child." Instead, it bans abortion based on ancillary overriding justifications not considered in *Roe* or *Casey*, just like the ban on partial-birth abortion upheld in *Gonzales*. To put it another way—in Judge Manion's words—Indiana "has a compelling interest in prohibiting [abortions] performed simply because the unborn child is of the wrong sex the wrong race or has a genetic disability. And it is hard to imagine legislation more narrowly tailored to promote this interest." App. 35a.

The non-discrimination provision is a qualitatively new type of abortion regulation, one that neither implicates the concerns underlying *Roe* and *Casey* nor

burdens the right those cases ultimately protect. It regulates women who have *already* made the decision "to bear or beget a child," but simply do not want to bear a *particular* child. Only this Court can correct the lower court's misperception that *Roe* and *Casey* bar this law. Accordingly, the Court should grant certiorari and uphold Indiana's authority to put an end to eugenic abortions.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Dated: October 12, 2018

In the
United States Court of Appeals
For the Seventh Circuit

No. 17-3163

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Plaintiffs-Appellees,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:16-cv-00763-TWP-DML
Tanya Walton Pratt, *Judge.*

ARGUED FEBRUARY 15, 2018
DECIDED APRIL 19, 2018

Before BAUER, FLAUM, and MANION, *Circuit Judges.*

BAUER, *Circuit Judge.* On March 24, 2016, the Governor of Indiana signed into law House Enrolled Act No. 1337 (HEA 1337), which created new provisions and amended others that regulate abortion procedures within Indiana. Shortly thereafter, Planned

Parenthood of Indiana and Kentucky ("PPINK") filed a lawsuit against the Commissioner of the Indiana State Department of Health, the prosecutors of Marion, Lake, Monroe and Tippecanoe Counties, and members of the Medical Licensing Board of Indiana (collectively, "the State"). PPINK sought declaratory and injunctive relief from three particular parts of the law: (1) the new provisions titled "Sex Selective and Disability Abortion Ban," Ind. Code § 16-34-4 (2016), which prohibit a person from performing an abortion if the person knows the woman is seeking an abortion solely for one of the enumerated reasons (collectively, "the nondiscrimination provisions"); (2) an added provision to the informed consent process, instructing those performing abortions to inform women of the non-discrimination provisions, § 16-34-2-1.1(a)(1)(K); and (3) numerous amendments to the provisions dealing with the disposal of aborted fetuses, §§ 16-34-3-4(a); 16-41-16-4(d); 16-41-16-5; 16-41-16-7.6 (collectively, "the fetal disposition provisions").

The district court initially entered a preliminary injunction on June 30, 2016, and both parties subsequently filed motions for summary judgment. The court granted PPINK's motion for summary judgment on September 22, 2017, declaring the three parts of HEA 1337 unconstitutional and permanently enjoining the State from enforcing them.

We affirm. The non-discrimination provisions clearly violate well-established Supreme Court precedent holding that a woman may termi ate her pregnancy prior to viability, and that the State may not prohibit a woman from exercising that right for any

reason. Because the non-discrimination provisions are unconstitutional, so too is the provision that a woman be informed of them. Additionally, the amended fetal disposition provisions violate substantive due process because they have no rational relationship to a legitimate state interest.

I. BACKGROUND

PPINK provides reproductive health services and education to thousands of women throughout Indiana and Kentucky. At its Bloomington, Indianapolis and Merrillville centers, PPINK performs surgical abortions through the first trimester of pregnancy (approximately 14 weeks). At these three centers, as well as the Lafayette center, PPINK also performs non-surgical, or medication, abortions.

A. The Non-Discrimination and Informed Consent Provisions

HEA 1337 creates Indiana Code chapter 16-34-4, entitled "Sex Selective and Disability Abortion Ban." The various provisions of this chapter prohibit abortions at any time, including prior to viability, if the abortion is sought for a particular purpose. Specifically, the non-discrimination provisions state that "[a] person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking" an abortion: (1) "solely because of the sex of the fetus," Ind. Code §§ 16-34-4-4, 16-34-4-5; (2) "solely

because the fetus has been diagnosed with Down syndrome or has a potential diagnosis of Down syndrome," or has been diagnosed or has a potential diagnosis of "any other disability," §§ 16-34-4-6, 16-34-4-7; or (3) "solely because of the race, color, national origin, or ancestry of the fetus." § 16-34-4-8. The term "potential diagnosis" means "the presence of some risk factors that indicate that a health problem may occur," § 16-34-4-3, and "any other disability" is defined as "any disease, defect, or disorder that is genetically inherited," including both physical and mental disabilities. § 16-34-4-1.

Under Indiana law, it is a felony to knowingly and intentionally perform an abortion that is prohibited by law. See § 16- 34-2-7(a).Moreover, a person who knowingly and intentionally provides an unlawful abortion is subject to (1) "disciplinary sanctions," and (2) "civil liability for wrongful death." § 16-34- 4-9(a).

Indiana law requires that certain information be provided to a woman at least 18 hours prior to the abortion as part of the voluntary and informed consent process. See § 16-34-2-1.1(a). HEA 1337 adds a new provision requiring the abortion provider to inform a woman "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." § 16-34-2-1.1(a)(1)(K).

According to the State, the non-discrimination provisions were prompted by the medical advances of non-invasive genetic testing which allow for the de-

tection of disabilities at an early stage in the pregnancy. In particular, cell-free DNA testing, which screens for several genetic disabilities such as Down syndrome, can occur as early as 10 weeks into the pregnancy. PPINK does not provide genetic testing, but is aware that it performs abortions for women solely because of the diagnosis or potential diagnosis of Down syndrome and other disabilities. PPINK and the State agree that the rate of women seeking an abortion due to the diagnosis or potential diagnosis of a genetic disability will likely increase as these tests become more widespread.

B. The Fetal Disposition Provisions

HEA 1337 also changes the manner in which abortion providers must dispose of aborted fetuses. HEA 1337 did not alter the provision of the Indiana Code that gives a woman "the right to determine the final disposition of the aborted fetus." § 16-34-3-2(a). Prior to the enactment of HEA 1337, if a woman decided to let the abortion facility dispose of the fetus, Indiana regulations state that the facility must either bury or cremate the fetus. See 410 Ind. Admin. Code § 35-2-1(a). Those regulations specify that cremation means "incineration by a crematory, or incineration as authorized for infectious and pathological waste" under Indiana law. 410 Ind. Admin. Code § 35-1-3. Infectious waste includes pathological waste, Ind. Code § 16-41-16-4(b)(1), and pathological waste is defined as "(1) tissue; (2) organs; (3) body parts; and (4) blood or body fluids in liquid or semiliquid form; that are removed during surgery, biopsy, or autopsy." § 16-41-16-5.

Thus, prior to the enactment of HEA 1337, a woman might decide to dispose of the aborted fetus herself; or the facility that provided the abortion might dispose of the fetus through incineration along with other surgical byproducts. PPINK has utilized a contractor who periodically incinerates aborted fetuses along with other surgical byproducts.

HEA 1337 alters the manner in which an abortion provider must dispose of an aborted fetus if the woman elects not to dispose of it herself. Specifically, the new law states that "[a]n abortion clinic or health care facility having possession of an aborted fetus shall provide for the final disposition of the aborted fetus. The burial transmit permit requirements of [Indiana Code] 16-37-3 apply to the final disposition of an aborted fetus, which must be interred or cremated." § 16-34-3-4(a). A "burial transmit permit" is a "permit for the transportation and disposition of a dead human body" as required under Indiana law. § 23-14-31-5. The amended provisions also state that "[a]borted fetuses may be cremated by simultaneous cremation." § 16-34-3-4(a).

Moreover, HEA 1337 changed the definitions of both infectious and pathological waste, stating that these terms "do[] not include an aborted fetus or a miscarried fetus." §§ 16- 41-16-4(d), 16-41-16-5. Thus, abortion providers like PPINK will no longer be able to contract with third parties to incinerate aborted fetuses with other surgical byproducts. Rather, the law will require PPINK to bury, cremate, or entombed the

aborted fetuses, although the fetuses maybe cremated simultaneously.

C. Procedural History

On April 7, 2016, two weeks after the Indiana Governor signed HEA 1337, PPINK filed a complaint in the Southern District of Indiana seeking declaratory and injunctive relief from the non-discrimination and fetal disposition provisions, which it alleged were unconstitutional. HEA 1337 was to go into effect on July 1, 2016. After extensive briefing and oral argument, the district court determined on June 30, 2016, that PPINK was likely to succeed on the merits, and granted a preliminary injunction barring the State from implementing and enforcing these provisions.

Both PPINK and the State moved for summary judgment. On September 22, 2017, the district court granted PPINK's motion for summary judgment and entered a permanent injunction declaring the non-discrimination and fetal disposition provisions unconstitutional. *Planned Parenthood of Ind. & Kent., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017). The court found that the non-discrimination provisions clearly violate Supreme Court precedent that a woman has the right to terminate her pregnancy prior to viability without undue interference from the State. *Id.* at 865–69. Having found those provisions unconstitutional, the court also held that the informed consent provision on the nondiscrimination provisions was unconstitutional. *Id.* at 869. Finally, the court held that although the

fetal disposition provisions do not implicate a fundamental right, they violate substantive due process because they lack a rational relationship to a legitimate governmental interest. *Id.* at 869–72.

II. DISCUSSION

We review a grant of summary judgment de novo, construing all factual disputes and reasonable inferences in favor of the non-moving party. *Golla v. Office of Chief Judge of Cook Cty., Ill.*, 875 F.3d 404, 407 (7th Cir. 2017). The moving party is entitled to summary judgment as a matter of law if they have shown there is "no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a).

A. The Non-Discrimination Provisions Violate a Woman's Fourteenth Amendment Right to Terminate Her Pregnancy Prior to Viability

Forty-five years ago, the Supreme Court recognized that the right to privacy, as rooted in the Due Process Clause of the Fourteenth Amendment's concept of liberty, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. 113, 153 (1973). The Court in Roe recognized that "this right is not unqualified," and that it must be balanced "against important state interests in regulation." *Id.* at 154. *Roe* developed a rigid trimester framework by which to balance the competing interests. *Id.* at 164–65.

Although the Supreme Court abandoned the trimester framework when it revisited Roe's holding nearly twenty years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, it reaffirmed what it labeled as *Roe's* "essential holding:"

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

505 U.S. 833, 846 (1992) (plurality opinion).

The Court in *Casey* drew the line between a woman's privacy right and the State's interest in protecting the potential life of a fetus at viability. *Id.* at 870. Importantly, *Casey's* holding that a woman has

the right to terminate her pregnancy prior to viability is categorical: "a State *may not prohibit* any woman from making the ultimate decision to terminate her pregnancy *before viability*." Id. at 879 (emphasis added). Since *Casey*, this unambiguous holding has continued to be recognized as controlling precedent by the Supreme Court and this Court. See *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 987 (7th Cir. 2012).

Casey, like *Roe*, also noted that this right was not absolute. *Casey*, 505 U.S. at 875–76. "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted." *Id.* at 876. Accordingly, Casey introduced the undue burden standard: a state regulation creates an undue burden on a women's right to terminate her pregnancy if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. The Court in Casey elaborated that these sort of regulations prior to viability "must be calculated to *inform* the women's free choice, *not hinder it*." *Id.* (emphasis added). Thus, while the State may enact measures to inform a woman's choice to terminate her pregnancy, the State may not prohibit the woman from making "the ultimate decision." *Id.* at 878–79.

The non-discrimination provisions clearly violate this well-established Supreme Court precedent, and

are therefore, unconstitutional. The provisions prohibit abortions prior to viability if the abortion is sought for a particular purpose. These provisions are far greater than a substantial obstacle; they are absolute prohibitions on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State. *Id.* at 879 ("a State *may not prohibit* any woman from making the ultimate decision to terminate her pregnancy before viability.") (emphasis added). We are bound to follow that Supreme Court precedent. See *Karlin v. Foust*, 188 F.3d 446, 495 (7th Cir. 1999). Unsurprisingly, other circuits who have dealt with prohibitions prior to viability have had no trouble striking them down. See, e.g., *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (statute prohibiting pre-viable abortions where the fetus has a detectable heartbeat); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (statute prohibiting pre-viable abortions where fetus is at least 20 weeks gestational age); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (statute prohibiting pre-viable abortions after twelve weeks where the fetus has a detectable heartbeat).

The State knows we cannot overturn Supreme Court precedent; rather, it argues that the non-discrimination provisions are reconcilable with this precedent. The State creatively suggests that *Casey* only reaffirmed a woman's "binary choice" of whether or not to have a child prior to viability. *See Casey*, 505 U.S. at 851 ("Our cases recognize 'the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision

whether to bear or beget a child.'") (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). In other words, according to the State, *Casey* only recognized a privacy right in the binary decision of whether to bear or beget a child, but that right is not extended to the decision to terminate a particular child.

Neither *Casey*, nor any other case, supports this "binary choice" theory. Under this theory, a woman may terminate her pregnancy if she decides *before* becoming pregnant that she does not want to bear a child at all, but she has no right to terminate the pregnancy if she determines *after* becoming pregnant that she does not want a particular child. Nothing in *Roe*, *Casey*, or any other case from the Supreme Court can be read to limit a woman's right in this way. Moreover, no court, let alone the Supreme Court, has recognized such a limitation. Rather, *Casey* held that the State may not prohibit a woman from making the "ultimate decision" to terminate her pregnancy prior to viability, and the State's power, prior to viability, is limited to informing the woman's choice. *Id.* at 877–79.

Moreover, such a "binary choice" theory runs contrary to the fact that a woman's right to terminate her pregnancy prior to viability is rooted in the Fourteenth Amendment's right to privacy. It is entirely inconsistent to hold that a woman's right of privacy to terminate a pregnancy exists if a woman decides before she becomes pregnant that she does not want to bear a child, but that the State can eliminate this privacy right if a woman later decides she wants to terminate her pregnancy for a particular purpose.

Nothing in the Fourteenth Amendment or Supreme Court precedent allows the State to invade this privacy realm to examine the underlying basis for a woman's decision to terminate her pregnancy prior to viability.

The State urges that the non-discrimination provisions represent a "qualitatively new type of abortion regulation," and that it has compelling interests in prohibiting discrimination of particular fetuses in light of technological advances in genetic screening. Indeed, as we have noted, the State "has legitimate interests from the outset of the pregnancy in protecting the health of the woman and life of the fetus that may become a child." *Id.* at 846. But the Supreme Court has already weighed the State's interests against a woman's privacy right to terminate her pregnancy prior to viability: "*Before viability, the State's interests are not strong enough to support a prohibition of abortion* or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* (emphasis added).[1] We cannot re-

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[1] Wisconsin and other states, as amici curiae, maintain that *Casey* only addressed the state interests "*actually urged* before the Supreme Court, such as the State's general interest in unborn life and the health of the mother." They thus contend that "[i]t is wrong to understand the Supreme Court's language as holding that pre-viability abortion is such an absolute right that every conceivable state interest must always yield to that right." This argument is not persuasive because it ignores that Court's rationale for providing the right to an abortion prior to viability in the first place; the woman's right to privacy protected by the liberty interest guaranteed by the Fourteenth Amendment. In short, the Court's decision to draw the line at viability was more

weigh a woman's privacy right against the State's interest. The Supreme Court has been clear: the State may inform a woman's decision before viability, but it cannot prohibit it.

The State concedes that if we conclude the non-discrimination provisions are unconstitutional, the provision requiring abortion providers to inform women of the non-discrimination provisions is also unconstitutional. Since we conclude that the non-discrimination provisions found in the "Sex Selective and Disability Abortion Ban," Ind. Code § 16-34-4, violate a woman's Fourteenth Amendment right to privacy, § 16-34-2- 1.1(a)(1)(K) of the informed consent provisions is unconstitutional, as well.

B. The Fetal Disposition Provisions Violate Substantive Due Process

PPINK contends that the fetal disposition provisions violate both substantive due process and equal protection principles. Since we conclude that the fetal disposition provisions violate due process, we need not address whether the provisions suffer from any equal protection problems.

PPINK agrees that no fundamental right is at stake. When a fundamental right is not implicated, substantive due process only "prohibits arbitrary deprivations of liberty by the government." *Hayden*

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about the woman's liberty interest than the State's competing interest.

ex rel. A.H. v. Greensburg Cmty. Sch. Corp., 743 F.3d 569, 576 (7th Cir. 2014). Accordingly, we apply rational basis review, meaning the fetal disposition provisions must "be rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). It is incumbent upon PPINK to demonstrate that the provisions violate substantive due process, and PPINK carries a high burden: "So long as there is any conceivable state of facts that supports the policy, it passes muster under the due process clause; put another way, only if the policy is patently arbitrary would it fail." *Hayden*, 743 F.3d at 576.

The fetal disposition provisions essentially require abortion providers to dispose of aborted fetuses in the same manner as human remains, as required under Indiana law. According to the State, the provisions further the State's legitimate interest in "the humane and dignified disposal of human remains." Such a position inherently requires a recognition that aborted fetuses are human beings, distinct from other surgical byproducts, such as tissue or organs. Indeed, in its brief, Indiana maintained that it "validly exercised its police power by making a moral and scientific judgment *that a fetus is a human being* who should be given a dignified and respectful burial and cremation." (emphasis added).

However, the Supreme Court has concluded that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe*, 410 U.S. at 158. In reaching this conclusion, the Court in *Roe*

noted that "[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Id.* at 159. While this question may continue to be disputed among those respective disciplines, it is not disputed in the law. *See Coe v. Cty. of Cook*, 162 F.3d 491, 495 (7th Cir. 1998) ("[T]he courts have decided that a fetus is not a person within the meaning of these clauses.").

Simply put, the law does not recognize that an aborted fetus is a person. "This conclusion follows inevitably from the decision to grant women a right to abort. If even a [non-viable] fetus is a person, surely the state would be allowed to protect [the fetus] from being killed." *Id.* As such, the State's interest in requiring abortion providers to dispose of aborted fetuses in the same manner as human remains is not legitimate.

The State asks us to infer a legitimate interest by pointing to state and federal fetal homicide statutes, as well as state wrongful death statutes that treat non-viable fetuses as human beings. But these statutes seek to address a valid state interest in promoting respect for potential life. The fetal disposition provisions differ because there is no potential life at stake. The State also argues that the Supreme Court in *Gonzales v. Carhart* recognized the State's interest in fetal human dignity. 550 U.S. at 163 (noting "the State's interest in promoting respect for human life at all stages of the pregnancy"). However, *Gonzales*

involved a "ban on abortions that involve partial delivery of a living fetus." *Id.* at 158 (emphasis added). *Gonzales* did not extend the State's interest beyond protecting potential fetal life that was reaffirmed in *Casey*. *Id.* ("[T]he State, from the inception of pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child.").

The State also relies on an Eighth Circuit decision upholding, on vagueness and substantive due process challenges, a Minnesota fetal disposition statute, which provided that fetuses of a certain age be disposed of "by cremation, interment by burial, or in a manner directed by the commissioner of health." *Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479, 481 n.2 (8th Cir. 1990). As that court noted, the Supreme Court has recognized that the State has a legitimate interest "in regulating the disposal of fetal remains." *Id.* at 481; see also *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452 n.45 (1983), *overruled on other grounds by Casey*, 505 U.S. at 881–85 (noting that a state or municipality has a "legitimate interest in proper disposal of fetal remains").

First, in *Planned Parenthood of Minnesota*, "Planned Parenthood concede[d] the state ha[d] a legitimate interest in protecting public sensibilities." 910 F.2d at 488. Therefore, the Eighth Circuit's discussion about the nature of the state interest was mere dicta. Second, the State's interest here in the humane and dignified disposal of an aborted fetus is meaningfully different. The Minnesota statute's stated purpose was "to protect the public health and

welfare by providing for the dignified and sanitary disposition of the remains of aborted or miscarried fetuses in a uniform manner." *Id.* at 481 n.2. The Eighth Circuit reiterated that the "Minnesota's legislature's overriding concern was protection of the public's sensibilities by ensuring that fetal remains be disposed of in a specified manner." *Id.* at 488. Thus, while Minnesota focused on the interest of the *public*, Indiana focuses on the interest of the *fetus*. Indeed, the State's interest here goes well beyond the sanitary or unitary disposal of aborted fetuses, interests which are already being carried out under current Indiana law and health regulations prior to HEA 1337. Instead, the humane and dignified disposal of aborted fetuses requires recognizing that the fetus is legally equivalent to a human. Since the law does not recognize the fetus as a person, that is simply not a legitimate interest.

Even if we were to conclude that the State's interest is legitimate, it is not rationally related to that interest for two reasons. First, the fetal disposition provisions did not amend Indiana law that gives a woman "the right to determine the final disposition of the aborted fetus." Ind. Code § 16-34-3-2(a). Thus, a woman may take possession of the aborted fetus and dispose of it in whatever manner she wishes, without restriction. No such provision under Indiana law allows for people to dispose of human remains in whatever manner they wish. Rather, Indiana law is exhaustive in its requirements for the disposition of human remains. *See* § 16-37-3-1, *et. seq.* (regulating disposition of dead bodies); § 23-14-54-1, *et seq.* (setting forth the disposition of dead human bodies at

crematories); § 25-15-2-7 (defining disposition of human remains as interment at cemetery or mausoleum; disposal of cremated remains on property, public land, or water; or burial at sea, among other definitions).

Second, the fetal disposition provisions also allow for simultaneous cremation of aborted fetuses. § 16-34-3-4(a). Indiana law only permits simultaneous cremation of human remains if there is prior written consent by authorizing agents. § 23-14-31-39(a). By allowing simultaneous cremation, the fetal disposition provisions do not treat aborted fetuses the same as human remains. In fact, PPINK essentially employs simultaneous cremation under the current law; HEA 1337 would simply prevent PPINK from using third parties for mass cremation with other surgical byproducts.

Thus, we cannot identify a rational relationship between the State's interest in "the humane and dignified disposal of human remains" and the law as written, given that it allows a woman full liberty to dispose of the fetus without restriction, and continues to allow for mass cremation of fetuses. Accordingly, the fetal disposition provisions violate substantive due process and are also unconstitutional.

III. CONCLUSION

Because we conclude that the non-discrimination provisions and the fetal disposition provisions are unconstitutional, we AFFIRM the district court's grant of summary judgment in favor of PPINK, and the

court's permanent injunction barring the enforcement of these provisions.

MANION, *Circuit Judge*, concurring in the judgment in part and dissenting in part. To put it mildly, this is an unfortunate case. Yet I must agree with the court that Supreme Court precedent compels us to invalidate Indiana's attempt to protect unborn children[1] from being aborted solely because of their race, sex, or disability. That a narrowly drawn statute meant to protect especially vulnerable unborn children cannot survive scrutiny under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), is regrettable. But the fact remains that under the *Casey* regime, the purported right to have a pre-viability abortion is more ironclad even than the rights enumerated in the Bill of Rights. Only a majority of the Supreme Court or a constitutional amendment can permit the States to place some limits on abortion.

The court then goes further than *Casey* requires, distinguishing an Eighth Circuit case and invalidating Indiana's requirement that abortion clinics bury or cremate fetal remains. I cannot agree. This is but the latest example of the legal misdirection that occurs in abortion cases. See *Hill v. Colorado*, 530 U.S.

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[1] The term "unborn child" is disfavored by some pro-choice advocates, but it is also used in Supreme Court opinions. See *Gonzales v. Carhart*, 550 U.S. 124, 134 (2007) ("Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development."). I use it throughout this dissent to refer to the living fetus developing during the course of a pregnancy.

703, 741–42 (2000) (Scalia, J., dissenting). Under traditional rational basis review, if state action doesn't infringe upon a fundamental right or affect a protected class, we will uphold it so long as it is rationally related to a legitimate state interest. The fetal remains provision easily satisfies that extremely deferential standard. That part of Indiana's law rationally advances Indiana's interests in protecting public sensibilities and recognizing the dignity and humanity of the unborn.

For the reasons that follow, I concur only in the court's judgment invalidating the nondiscrimination and disclosure provisions. I dissent from the portion of the judgment invalidating the fetal remains provision.

I. The Nondiscrimination Provisions

House Enrolled Act 1337 prohibits the performance of an abortion when the doctor knows that the woman seeks an abortion solely because of the race, sex, or disability of the unborn child. The provisions apply at any point in the pregnancy, so they directly implicate the right devised in *Casey* and *Roe v. Wade*, 410 U.S. 173 (1973). *Casey's* controlling joint opinion held that any regulation on abortion is invalid if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (plurality opinion). The nondiscrimination provisions have both the purpose *and* effect of *prohibiting* some women—those who want sex-, race-, or disability-selective abortions—from obtaining an abortion. Thus, they

erect a substantial obstacle for those women. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016) ("the relevant denominator is 'those [women] for whom [the provision] is an actual rather than an irrelevant restriction.'" (quoting *Casey*, 505 U.S. at 895)).

Indiana and the *amici* States persuasively argue that the right identified in *Roe* and *Casey* is only the right to decide *whether* to have a child, not the right to decide *which* child to have. This argument makes sense. After all, the women for whom the nondiscrimination provisions present an obstacle have already determined that they want a child. The nondiscrimination provisions simply prohibit those women from targeting their unborn child because of later-discovered immutable human characteristics. Indiana and the *amici* States have made a noble effort to defend a statute that should need no defense. But the fact remains that *Casey* has plainly established an absolute right to have an abortion before viability. The joint opinion says that *nothing* can stand between a woman and her choice of abortion before viability. See, e.g., *Casey*, 505 U.S. at 870 ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy."); *id.* at 874 ("[T]he right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."); *id.* at 877 ("What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so."). While States may legislate to encourage informed consent or ma-

ternal health, legislation that does *too well* at convincing women to choose life has been held invalid. See *id.* at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).

As an intermediate appellate court, we are bound to follow *Casey*, and so I must agree with the court that the nondiscrimination provisions are invalid. Yet this case reveals two major flaws of the *Casey* analysis that combine to produce such an absurd result—absurd even relative to other abortion cases. First, *Casey* treats abortion as a super-right, more sacrosanct even than the enumerated rights in the Bill of Rights. And second, while *Casey* jettisoned *Roe's* strict-scrutiny test for all first-trimester abortion regulation, it replaced strict scrutiny with an effects-based test that is actually *more difficult* to satisfy in many cases.

Further, if we applied strict scrutiny in this case, Indiana could prevail. The nondiscrimination provisions are narrowly tailored to target invidious discrimination against people whom nobody would deny would be members of protected classes were they allowed to be born. Surely, Indiana has a compelling interest in attempting to prevent this type of private eugenics. And the prohibitions would not affect the vast majority of women who choose to have an abortion without respect to the race, sex, or disability of the unborn child.

A. Abortion is a "Super-Right" Immune Even to Strict Scrutiny

Ranking member of the Senate Judiciary Committee Dianne Feinstein has often referred to *Roe* as "super-precedent."[2] Of course, there's no such thing as "super-precedent"—any case may be overruled by five Supreme Court Justices. But while *Roe* isn't super-precedent, it did spawn a body of jurisprudence that has made abortion the only true "super-right" protected by the federal courts today. The purported right to an abortion before viability is the *only* one that may not be infringed even for the very best reason. For an unenumerated right judicially created just 45 years ago, that is astounding.

The typical tiers-of-scrutiny analysis courts conduct in constitutional cases is a means-ends analysis. See *United States v. Williams*, 616 F.3d 685, 691 (7th Cir. 2010) (If a claim falls within the scope of the Second Amendment, courts "apply some level of 'means-ends' scrutiny to establish whether the regulation passes constitutional muster."). Strict scrutiny requires both a compelling end and a tight fit between means and ends; the government must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v.*

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[2] For further criticism of "super-precedent," see David French's commentary in *National Review* on Senator Feinstein's questioning of then Judge Neil Gorsuch at his Supreme Court confirmation hearing. David French, *No, Senator Feinstein*, Roe v. Wade *is Not a 'Superprecedent'*, National Review, Mar. 21, 2017, https://www.nationalreview.com/2017/03/dianne-feinstein-roe-v-wade-neil-gorsuch-superprecedent-lie/.

Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (quoting *Ariz. Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721, 734 (2011)). That's a hard standard to meet, but the Supreme Court has in recent years held that restrictions on fundamental rights like freedom of speech and the right to be free from racial discrimination satisfied strict scrutiny. See, e.g., *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) (upholding Florida judicial conduct rule prohibiting judicial candidates from personally soliciting campaign funds); *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (upholding racially discriminatory college admissions program on the ground that it is narrowly tailored to satisfy the university's interest in attaining diverse student body). This isn't surprising in its own right. After all, "even the fundamental rights of the Bill of Rights are not absolute." *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949). But when contrasted against the absolute nature of the putative right to pre-viability abortion, we see that abortion is now a more untouchable right than even the freedom of speech.

The doctrinal reason for this is that *Casey's* "undue burden" standard is not a means-ends test, but a pure effects test. The key quote from the *Casey* joint opinion reveals this: a regulation of abortion is invalid if it "has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (emphasis added). This means that even a regulation narrowly tailored to serve a compelling state interest is invalid if it prohibits any abortions before viability.

After all, a prohibition is not just a substantial obstacle, but a complete obstacle. As one commentator supportive of abortion rights explained, "undue burden wholly lacks such a nexus inquiry: under *Casey*, courts must analyze a statute's purpose and its effects, but need not assess the relationship between the two." Emma Freeman, Note, *Giving* Casey *its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 Harv. C.R.-C.L. L. Rev. 279, 279–80 (2013).

The "purpose or effect" formulation will inevitably bar every attempt to limit the incidence of abortion, even those that don't prohibit particular abortions. As Justice Scalia correctly observed, *Casey* permits Indiana to try to persuade women to choose life "only so long as it is not too successful." *Casey*, 505 U.S. at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).[3] Since courts cannot consider

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[3] Justice Scalia's quote brings to mind another issue that looms over most abortion cases. Planned Parenthood and other supporters of abortion rights say that they are "pro-choice." Yet they often challenge legislation simply intended to inform a woman's choice. For example, the plaintiff in this case also obtained a preliminary injunction prohibiting Indiana from enforcing its requirement that a woman view an ultrasound at least 18 hours before an abortion is performed unless she elects in writing not to do so. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 273 F. Supp. 3d 2013 (S.D. Ind. 2017), appeal filed No. 17-1883 (7th Cir.). Planned Parenthood knows that the ultrasound is an "invaluable tool in revealing the personhood of unborn children." National Institute of Family and Life Advocates, *A Comprehensive Medical Conversion Program*, https://nifla.org/life-choice-project-tlc/ (last visited

the weight of the State's interest in a particular case, all that matters is how effective the statute will be at limiting abortion. If we applied this standard to other constitutional claims, no plaintiff would ever lose. After all, state action prohibiting a plaintiff's speech would certainly erect a "substantial obstacle" to that speech, and state action prohibiting particular people from possessing firearms would be a "substantial obstacle" to the exercise of those individuals' Second Amendment rights. But that's not how it works. Instead, States may even prohibit political speech. See *Williams-Yulee*, 135 S. Ct. at 1682–83 (Kennedy, J., dissenting) ("The individual speech here is political speech. The process is a fair election. These realms ought to be the last place, not the first, for the Court

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April 6, 2018). That's why it denigrates pro-life pregnancy centers that seek to show ultrasounds to women considering abortion. See Brief for Planned Parenthood Affiliates of California, et al., in *Nat'l Inst. of Family & Life Advocates v. Becerra* at 29–30, No. 16-1140 (Sup. Ct. 2018).

Indeed, Planned Parenthood and its allies have gone as far as to support California's effort to force pro-life pregnancy centers to advertise for abortion. See *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016), cert. granted sub nom. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 464 (2017). One need not wonder what Planned Parenthood's reaction would be if a State were to require its clinics to advertise for free ultrasounds and counselors at pro-life pregnancy centers. If Planned Parenthood were really pro-choice (and not just pro-abortion), it would encourage a client who had initially been happy to be pregnant to seek counseling elsewhere when she discovered that her unborn child had Down syndrome or another disability. Such counseling with an informed advocate for the living fetus would benefit both the woman and her unborn child.

to allow unprecedented content-based restrictions on speech."). And the federal government can withdraw Second Amendment rights from significant groups of people based on prior conduct. *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc) (upholding the constitutionality of 18 U.S.C. § 922(g)(9), which prohibits those convicted of misdemeanor domestic violence from possessing firearms). While these fundamental rights are subject to significant limitations under heightened scrutiny, the purported right to an abortion before viability is absolute because of *Casey's* purpose or effect test.

That today's outcome is compelled begs for the Supreme Court to reconsider *Roe* and *Casey*. But assuming the Court is not prepared to overrule those cases, it is at least time to downgrade abortion to the same status as actual constitutional rights. The Court can start by permitting the States to assert their legitimate interests in defense of abortion laws. Since *Casey* disavowed universal application of strict scrutiny in abortion cases, the question remains how to determine the proper means-ends test to apply. Fortunately, one already exists that would give courts flexibility to adjust the level of scrutiny based on the severity of the "burden" on the putative abortion right: the *Anderson-Burdick* sliding scale the Court uses to evaluate election regulations.

Anderson-Burdick is a sliding scale of means-ends scrutiny. *Libertarian Party of New Hampshire v. Gardner*, 638 F.3d 6, 14 (1st Cir. 2011). If an election law imposes a severe burden on speech and association rights, it must satisfy strict scrutiny. *Burdick v.*

Takushi, 504 U.S. 428, 434 (1992) (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)). But if the law is "reasonable" and "nondiscriminatory," then rational basis review is proper and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)); see also *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–91 (2008) (plurality opinion) ("However slight that burden may appear ... it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" (quoting *Norman*, 502 U.S. at 288–89)). In this context, *Anderson-Burdick* would require a plaintiff challenging a restrictive abortion law to make a threshold showing that the regulation was a "severe" burden on the right. If the plaintiff could manage that, then the State would have to satisfy strict scrutiny. If not, then courts would uphold [the regulation] so long as it was rationally related to a legitimate government interest.

Replacing *Casey's* "purpose or effect" test with *Anderson-Burdick's* sliding scale (or any other means-ends test) would at least give Indiana a chance to defend its ban on discriminatory abortions. As it is, the State loses before it can even say a word. That disparate treatment of abortion cases is not only unfair, but lacks any basis in text, structure, or tradition. It is an aberration that should be corrected. I continue to agree with the dissenting justices in *Roe* and *Casey*. But if we are stuck with those landmark decisions, the abortion rights those cases created should at least be on a level playing field with the rest of the Constitution. The *Casey* abortion-specific test should

be replaced with traditional means-ends scrutiny. This would go a long way towards normalizing the federal courts' abortion jurisprudence.

B. Indiana Might Prevail Under Strict Scrutiny

If the Court were to agree to apply strict scrutiny to the nondiscrimination provisions, what would happen? Admittedly, this is a difficult question, because *Casey* has not permitted means-ends scrutiny of abortion laws for decades. Indiana appears to be the first State that has attempted to protect particular unborn children from abortion based on their human characteristics.[4] Nevertheless, the analysis should not be all that difficult. Nobody would dispute that Indiana has a compelling interest in protecting mixed-race children, women, and disabled individuals from discrimination. That the developing human lives Indiana seeks to protect are preborn shouldn't change that.

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[4] Other states have followed Indiana's lead, so this particular issue is not going away. An Ohio district court recently granted a preliminary injunction prohibiting enforcement of a similar Ohio law. *Preterm-Cleveland v. Himes*, No. 1:18-cv-109, _ F. Supp. 3d _, 2018 WL 1315019 (S.D. Ohio Mar. 14, 2018). And the Utah House of Representatives recently passed a similar bill by a 54-17 vote this past February. Ben Lockhart, *Committee Likely to Prevent Senate Hearing on Bill Barring Down Syndrome Abortions, Sponsor Says*, Deseret News, Mar. 7, 2018, https://www.deseretnews.com/article/900012362/committee-likely-to-prevent-senate-hearing-on-bill-barring-down-syndrome-abortions-sponsor-says.html.

Race, sex, and disability-selective abortions are obviously all problematic,[5] but I will focus here on the particular problem of abortion due to a diagnosis of Down syndrome.[6] Permitting women who otherwise

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[5] Opposing sex-selective abortions, for instance, used to be uncontroversial. As recently as 2007, the Ethics Committee of the American College of Obstetricians and Gynecologists "oppose[d] meeting requests for sex selection for personal and family reasons, including family balancing, because of the concern that such requests may ultimately support sexist practices." American College of Obstetricians and Gynecologists Committee on Ethics, *Sex Selection*, No. 360, p. 3 (Feb. 2007), available at https://www.nzord.org.nz/news/news-and-press-releases?a=4239. The Committee "share[d] the concern expressed by the United Nations and the International Federation of Gynecology and Obstetrics that sex selection can be motivated by and reinforce the devaluation of women." *Id.* at 2. Research backs up this position, particularly noting the disastrous effects of widespread sex-selective abortion in Asia. See Hesketh, Lu, & Xing, *The Consequences of Son Preference and Sex-Selective Abortion in China and other Asian Countries*, 183 Canadian Med. Ass'n. J. 1374 (2011). Yet Planned Parenthood, which claims to be a women's rights organization, has still challenged a State ban on sex-selective abortion.

[6] Indiana's law and this litigation have provoked a public debate about abortion of unborn children with Down syndrome. Nationally syndicated columnists Marc Thiessen and George Will have weighed in strongly opposing the practice. Marc A. Thiessen, *When Will We Stop Killing Humans with Down Syndrome*, Wash. Post, Mar. 8, 2018, https://www.washingtonpost.com/opinions/when-will-we-stop-killinghumans-with-down-syndrome/2018/03/08/244c9eba-2306-11e8-badd7c9f29a55815_story.html?utm_term=.57852865480a; George F. Will, *The Real Down Syndrome Problem: Accepting Genocide*, Wash. Post, Mar. 14, 2018, https://www.washingtonpost.com/opinions/whats-the-real-down-syndrome-problem-the-genocide/2018/03/14/3c4f8ab8-26ee-11e8-

want to bear a child to choose abortion because the child has Down syndrome perpetuates the odious view that some lives are worth more than others and increases the "stigma associated with having a genetic disorder." Peter A. Benn & Audrey R. Chapman, *Practical and Ethical Considerations of Noninvasive Prenatal Diagnosis*, 301 J. Am. Med. Ass'n 2154, 2155 (2009). Weren't we done with that when society repudiated the disgraceful language in *Buck v. Bell*, 274 U.S. 200, 207 (1927), that "[t]hree generations of imbeciles are enough"? Yet some countries are now celebrating the "eradication" of Down syndrome through abortion. Alexandra DeSanctis, *Iceland Eradicates People with Down Syndrome*, National Review, Aug. 16, 2017, https://www.nationalreview.com/2017/08/down-syndrome-iceland-cbs-news-disturbing-report/. That not only devalues the lives of those living with Down syndrome, but it dis-incentivizes research that might help them in the future.

What is more, studies show that people with Down syndrome *and their parents and siblings* are quite happy and lead fulfilling lives. A 2011 Harvard study found that "[a]mong those surveyed, nearly 99% of people with DS indicated that they were happy with their lives, 97% liked who they are, and 96% liked how they look. Nearly 99% of people with DS expressed love for their families, and 97% liked

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b79df3d931db7f68_story.html?utm_term=.2ed16d15c40b. Ruth Marcus of the Washington Post has defended it. Ruth Marcus, *I Would've Aborted a Fetus with Down Syndrome. Women Need That Right*, Wash. Post, Mar. 9, 2018, https://www.washingtonpost.com/opinions/i-wouldve-aborted-a-fetus with-down-syndrome-women-need-that-right/2018/03/09/3aaac364- 23d6-11e8-94da-ebf9d112159c_story.html?utm_term=.8bcb5841a660.

their brothers and sisters." Skotko, Levine, & Goldstein, *Self-Perceptions From People With Down Syndrome*, 2011 Am. J. Med. Genetics 2360, 2360, 2364. In the same year, Boston Children's Hospital found that 99 percent of parents or guardians of Down syndrome children loved their child and 79 percent "felt their outlook on life was more positive because of their child." Boston Children's Hospital, *Parents Siblings and People With Down Syndrome Report Positive Experiences*, available at http://www.childrenshospital.org/news-andevents/2011/september-2011/parents-sibilings-and-peoplewith-down-syndrome-report-positive-experiences. (last visited April 19, 2018). Ninety-four percent of siblings 12 and older reported that they were proud of their Down syndrome brother or sister, and 88 percent said that they were better people because of their sibling. *Id.* Children with Down syndrome bring joy to everyone around them. And despite their limitations, they can go on to achieve great things. People like Karen Gaffney, who leads a non-profit foundation dedicated to advocating for those with Down syndrome, prove that point all the time. Gaffney has swam across Boston Harbor, completed a relay across the English Channel, and competed in the Escape from Alcatraz triathlon in the course of her advocacy. Down Syndrome International, *Karen Gaffney Braves the Elements to Complete Boston Harbour Swim*, https://dsint.org/news/karen-gaffney-braves-elements-complete-boston-harbour-swim-down-syndrome-international-13.(last visited April 19, 2018).[7]

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[7] To be clear, Indiana's compelling interest in prohibiting abortions sought because of the unborn child's disability stems

Even though Indiana cannot stop all abortions, it has a compelling interest in prohibiting those performed simply because the unborn child is of the wrong sex the wrong race or has a genetic disability. And it is hard to imagine legislation more narrowly tailored to promote this interest than the nondiscrimination provisions. The challenged sections only prohibit abortions performed *solely* because of the race, sex, or disability of the unborn child. The doctor also must know that the woman has sought the abortion solely for that purpose. These are provisions that apply only to very specific situations and carefully avoid targeting the purported general right to pre-viability abortion. They will not affect the vast majority of women who choose to have an abortion without considering the characteristics of the child. Indeed, they will not even affect women who consider the protected characteristics along with other considerations. If it is at all possible to narrowly tailor abortion regulations, Indiana has done so.[8]

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primarily from the intrinsic value and dignity of all humans, before and after birth, regardless of their utilitarian worth. But the statistics show that, contrary to the belief of some, a diagnosis of Down syndrome is not a sentence to a life of misery. Instead, those with Down syndrome lead fulfilling lives and bring joy to everyone around them.

[8] For comparison, the similar Ohio statute struck down in *Preterm Cleveland* (referenced in footnote 4) is not as narrowly tailored as Indiana's law. The Ohio law prohibits the performance an abortion if the doctor "has knowledge that the pregnant woman is seeking the abortion, *in whole or in part*, because of" a fetal diagnosis of Down syndrome. Ohio Rev. Code § 2919.10(B) (emphasis added). Because the Ohio statute prohibits abortions performed due *in part* to a diagnosis of Down syndrome, it prohibits more abortions than the law challenged here.

Because the nondiscrimination provisions are narrowly tailored to further a compelling state interest, they seem likely to satisfy strict scrutiny. This case thus highlights the problem with *Casey*'s "purpose or effect" test. While *Casey* purported to reject prior cases that gave short shrift to the State's interest in protecting unborn life, its abandonment of means-ends scrutiny can produce absurd results. One of those is that Indiana has lost the ability to defend its abortion restrictions, even under "the most demanding level of judicial review." *Smith v. Shalala*, 5 F.3d 235, 238 (7th Cir. 1993).

I would prefer to sustain the nondiscrimination provisions. Because I have no choice but to follow Supreme Court precedent, I reluctantly concur in the court's judgment invalidating them.[9]

II. The Fetal Remains Provision

The court also invalidates Indiana's requirement that abortion clinics bury or cremate the remains of the unborn child if the woman chooses to leave the remains with the clinic. I cannot agree.

The parties and the court agree that the fetal remains provision is subject only to rational basis re-

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[9] As the court explains, the disclosure provision falls with the nondiscrimination provisions. If the nondiscrimination provisions are invalid, it follows that Indiana cannot require physicians to tell women that Indiana law prohibits abortions performed because of the race, sex, or disability of the unborn child. Therefore, I also join the court's judgment invalidating this provision.

view. "Legislation in question is presumed to be rational." *Peterson v. Lindner*, 765 F.2d 698, 705 (7th Cir. 1985). That is, the mere fact that this legislation passed both Houses of the Indiana General Assembly and was signed by the Governor endows it with a presumption of rationality.[10] Indeed, it is hard to overstate how deferential our review is in rational basis cases under the Equal Protection and Due Process Clauses. In an equal protection case, we've said that "the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification." *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006). And in a due process case, we've emphasized that review is "highly deferential" to the point where government action "must be 'utterly lacking in rational justification.'" *Brown v. City of Michigan City*, 462 F.3d 720, 733 (7th Cir. 2006) (quoting *Turner v. Glickman*, 207 F.3d 419, 426 (7th Cir. 2000)). "Under rational basis review, the plaintiff almost invariably loses." Susannah W. Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. 887, 889 (2012).

The court errs in several respects. First, it draws a distinction from the Eighth Circuit, which has upheld a substantially similar Minnesota law. Then, the court adopts Planned Parenthood's red herring argument that Indiana cannot require fetal remains

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[10] House Enrolled Act 1337 easily passed both Houses of the General Assembly. After amendments, the Senate voted 37-13 in favor and the House concurred in the Senate amendments by a vote of 60-40. Indiana General Assembly, 2016 Session, Actions for House Bill 1337, https://iga.in.gov/legislative/2016/bills/house/1337#document-51b52d50 (last visited April 9, 2018).

be disposed with dignity because unborn children are not persons under the Fourteenth Amendment. And finally, the court departs from traditional rational basis review and requires far too close a fit between means and ends. Combined, these errors produce a result that would never happen in any context but abortion.

A. Distinction from the Eighth Circuit

In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 451–52 (1983)—a decision overruled by *Casey* because it *undervalued* the State's interest in unborn life—the Supreme Court invalidated on vagueness grounds an Akron ordinance that required doctors performing abortions to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner." But while the Court held that the ordinance failed to give doctors fair notice of what conduct would be criminalized, it was careful to explain that its decision wouldn't prevent Akron from enacting another ordinance with more definite terms. Indeed, the Court recognized in a footnote that States have a "legitimate interest in the proper disposal of fetal remains." *Id.* at 452. The problem with the ordinance wasn't that Akron could never regulate the disposition of fetal remains, but that its ordinance was not specific enough. *Akron* at least hinted that States may require that abortion doctors respect the dignity of the unborn child when disposing of her remains. What other interest could the Court have meant by the "*proper* disposal of fetal remains"? (emphasis added).

The Eighth Circuit then confronted a more definite statute in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). The challenged Minnesota law required that fetal remains be disposed of "by cremation, interment by burial, or in a manner directed by the commissioner of health." Minn. Stat. § 145.1621(4). The court held the law was not vague because it specifically described the ways in which remains must be disposed. *Planned Parenthood*, 910 F.2d at 482–83. Having avoided the *Akron* problem, the court went on to conclude that the requirement was rationally related to Minnesota's legitimate interest in protecting "public sensibilities." *Id.* at 488.

This case is very similar to the Eighth Circuit's decision. The Indiana Administrative Code provision here says that each abortion clinic "shall provide for the disposition of an aborted fetus by any of the following methods: (1) In the earth in an established cemetery pursuant to Ind. Code § 23-14-34. (2) Cremation." 410 Ind. Admin. Code § 35-2-1(a). And similar to the Minnesota law, Indiana's law does not apply to women who choose to take the remains of their unborn children home rather than leave them at the clinic. See *Planned Parenthood*, 910 F.2d at 488 (holding that "given the privacy concerns implicit in activity in one's home," the State could regulate clinics and not individual women disposing remains at home); Ind. Code § 16-34-3-2(a) ("A pregnant woman who has an abortion under this article has the right to determine the final disposition of the aborted fetus."). The Indiana and Minnesota laws are substantially similar in every material respect.

The court tries to distinguish *Planned Parenthood of Minnesota*, noting that the Eighth Circuit said the overriding purpose of the Minnesota law was "protection of the public's sensibilities by ensuring that fetal remains be disposed of in a specified manner." *Planned Parenthood*, 910 F.2d at 488. Indiana's law, the court says, "goes well beyond the sanitary or unitary disposal of aborted fetuses, interests which are already being carried out under current Indiana law and health regulations prior to HEA 1337." Maj. Op. at 15–16. But, while the Eighth Circuit termed Minnesota's interest "protecting public sensibilities," in reality the same state interest is involved in both cases; the dignified and humane disposal of the remains of unborn children. Why else would both laws dictate two methods of disposal typical for humans, but not typical for medical waste? Whether you call it "public sensibilities," "morality," or "human dignity," the state interest is the same. That interest is sufficient to justify the fetal remains provision.[11]

B. Fourteenth Amendment Personhood

That leads me to the next point. The court says it cannot accept Indiana's purported interests in dignified and humane disposition of fetal remains because that would "require[] recognizing that the fetus is le-

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[11] Indeed, an argument can be made that circulation under Circuit Rule 40(e) is appropriate here because the panel's decision creates a circuit split. See *United States v. Sinclair*, 770 F.3d 1148, 1158 n.2 (7th Cir. 2014). The panel avoids this problem by distinguishing *Planned Parenthood of Minnesota* from this case.

gally equivalent to a human." Maj. Op. at 16. According to the court, because unborn children are not recognized as persons under the Fourteenth Amendment, Indiana may not require they be treated as such. But this is a red herring. The Supreme Court's judgment that the Fourteenth Amendment does not protect the unborn certainly means that the States cannot interfere with the purported right to abortion. It also means that Indiana isn't *required* to treat fetal remains the same as other human remains, as it might be if the unborn had legal personhood. But it doesn't follow that the States can't—within the confines of *Roe* and *Casey*—recognize the dignity and humanity of the unborn. Indeed, a supermajority of the States already do just that by enforcing fetal homicide laws, the constitutionality of which has never been doubted. See Brief of Wisconsin, et al., as Amicus Curiae at 16; *Coleman v. DeWitt*, 282 F.3d 908, 912–13 (6th Cir. 2002) (rejecting a manslaughter defendant's argument that Ohio's fetal homicide statute was unconstitutional as applied to unborn children before viability).

Fetal homicide laws are different, the court says, because they "seek to address a valid state interest in promoting respect for potential life." Maj. Op. at 14. That misses the point. The court argues that States cannot treat unborn children as persons, but fetal homicide statutes, as well as wrongful death statutes treating non-viable fetuses as human beings, do just that. Even the term "fetal homicide" presumes that the unborn child is a person, at least for the purposes of those statutes, as "homicide" is "[t]he killing of one person by another." Black's Law Dictionary 802 (9th ed. 2009). It makes no sense to say that States may

value the dignity of an unborn child in some instances, but not if the pregnant woman wants to abort her. Simply put, the fact that the unborn are not persons under the Fourteenth Amendment does not prohibit States from recognizing their inherent dignity and humanity.

C. Fit between Means and Ends

Not content with devaluing the importance of Indiana's interests, the court proceeds to require far too tight a fit between those interests and the disposition requirements. The court says that Indiana isn't *really* treating aborted children as human beings because it still permits women to take fetal remains home from the abortion clinic and still allows for simultaneous cremation. So while the court's initial objection was that Indiana treats unborn children as too human, it then objects that the provision is irrational because it doesn't treat unborn children as human enough. That is not how rational basis review works.

The court's objections amount to claims that the fetal remains provision is underinclusive. But even where a law is "simultaneously overinclusive and underinclusive" it still may "easily" withstand rational basis review "because 'perfection is by no means required' and [a] 'provision does not offend the Constitution simply because the classification is not made with mathematical nicety.'" *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 656 (7th Cir. 2013) (quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979)). "[N]o legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987). The In-

diana General Assembly might rationally have decided that "given the privacy concerns implicit in activity in one's home," it did not want to regulate the conduct of women in their own homes. *Planned Parenthood*, 910 F.2d at 488. It could have also rationally concluded that it would be too costly to require individual cremation, or even that the law wouldn't have passed with such a requirement. These line-drawing questions are quintessentially legislative. Simply put, "the Constitution does not require [Indiana] to draw the perfect line nor even to draw a line superior to some other line it might have drawn. It requires only that the line actually drawn be a rational line." *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012). The General Assembly acted rationally, so we lack the power to disturb its judgment.

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Like the Eighth Circuit, I would conclude that Indiana's fetal remains provision is rationally related to the State's interest in protecting public sensibilities. I would add that Indiana has a significant interest in recognizing the dignity and humanity of the unborn child. "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals." *Tagami v. City of Chicago*, 875 F.3d 375, 379 (7th Cir. 2017) (quoting *Barnes v. Glen Theatre*, 501 U.S. 560, 568–69 (1991)). The People of Indiana have spoken. If we must permit abortion, they say, the victims of that procedure should at least be entitled to be treated better than medical waste. That judgment is not irrational.

I would reverse the judgment of the district court with respect to the fetal remains provision and remand with instructions to enter judgment for the State.

III. Conclusion

Indiana made a noble attempt to protect the most vulnerable members of an already vulnerable group. That it must fail is not due to lack of effort either by the legislators who drafted it or the Solicitor General who ably argued before us. The Supreme Court's abortion jurisprudence proved an insurmountable obstacle despite their best efforts. More than anything, this case illustrates the extent to which abortion has become the most favored right in American law. Without a significant recalibration, the States sadly cannot protect even unborn children targeted because of their race, sex, or a diagnosis of Down syndrome. But this court is powerless to change that state of affairs. Only the Supreme Court or a constitutional amendment can do that.

Until that time comes, there may be a workable standard that would preserve the putative general right to pre-viability abortion while permitting the States to prohibit certain abortions provided the prohibitions are narrowly drawn to further a compelling state interest. Prohibiting the targeting of particular unborn children who were originally welcomed but later targeted based on their immutable characteristics would meet that standard. If States cannot at least do this, abortion will remain the most sacred constitutional right. Still, even with the high wall that *Roe* and *Casey* have erected, it may be possible

to ensure that States can place some meaningful limits on abortion. Scrapping *Casey*'s "purpose or effect" test in favor of traditional means-ends scrutiny would be a good place to start.

As it is, I am compelled to concur in the court's judgment invalidating the nondiscrimination provisions and the disclosure provision. With respect to the fetal remains provision, however, I am not so constrained. I would hold that it is a legitimate exercise of Indiana's police power. Therefore, I respectfully dissent from that portion of the court's opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,	)	Case No. 1:16-cv-00763-TWP-DML
Plaintiffs,	)	
v.	)	
COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH *et al.*,	)	
Defendants.	)	

FINAL JUDGMENT PURSUANT TO FED R. CIV. PRO. 58

The Court having on September 22, 2017, made its Entry directing the entry of final judgment, the Court now enters **FINAL JUDGMENT**.

Judgment is entered in favor of Plaintiffs Planned Parenthood of Indiana and Kentucky, Inc. and Carol Dellinger, M.D., against Defendants in their official capacities.

It is **DECLARED** that the following provisions of House Enrolled Act 1337 violate the United States Constitution, and the State of Indiana, its agents and agencies, and all political subdivisions thereof are **ENJOINED** from enforcing them;

- The anti-discrimination provisions, Indiana Code §§ 16-34-4-4, 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8;
- The information dissemination provision, Indiana Code § 16-34-2-1.1(a)(1)(K); and
- As applied to pre-viability abortions and miscarriages only, all of the fetal tissue disposition provisions, including Indiana Code §§ 16-21-11-6; 16-34-3-4(a), 16-41-16-1, 16-41-16-4(d), 16-41-16-5 and 16-41-16-7.6.

Judgment is entered accordingly, and this action is **TERMINATED**.

Date: 10/11/2017

Hon. Tanya Walton Pratt, Judge
United States District Court
Southern District of Indiana

Laura A. Briggs, Clerk

BY: Deputy Clerk, U. S. District Court

To: All ECF-registered counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., and CAROL DELLINGER, M.D.,	)	Case No. 1:16-cv-00763-TWP-DML
Plaintiffs,	)	
v.	)	
COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH in his official capacity, PROSECUTORS OF MARION, LAKE, MONROE, AND TIPPECANOE COUNTIES in their official capacities, and THE INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA in their official capacities,	)	
Defendants.	)	

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on cross-motions for summary judgment filed by Plaintiffs Planned Parenthood of Indiana and Kentucky and Carol Dellinger, M.D. (collectively, "PPINK"), (Filing No.

73), and Defendants the Commissioner of the Indiana State Department of Health ("ISDH"), the Prosecutors of Marion, Lake, Monroe, and Tippecanoe Counties, and members of the Medical Licensing Board of Indiana (collectively, "the State"), all in their official capacities, (Filing No. 75).

On March 24, 2016, House Enrolled Act No. 1337 ("HEA 1337"), which creates new regulations of abortion and practices related to abortion, was signed into law. PPINK maintains that several provisions of HEA 1337 are unconstitutional. PPINK seeks to permanently enjoin the implementation and enforcement of these provisions, and a declaratory judgment that the challenged provisions are unconstitutional. For the reasons that follow, the Court concludes that the challenged provisions violate the Fourteenth Amendment to the United States Constitution and permanently enjoins enforcement of these provisions.

I. BACKGROUND

PPINK is a non-profit healthcare provider which offers reproductive healthcare, family planning, and preventive primary-care services. (Filing No. 30-1 at 1.) At the outset of this case, it operated twenty-three health centers in Indiana and two in Kentucky. (Filing No. 30-1 at 1.) Three of the Indiana health centers, located in Bloomington, Merrillville, and Indianapolis, provide surgical abortion services to patients. (Filing No. 30-1 at 1.) Surgical abortions are available at these centers only through the first trimester of pregnancy. (Filing No. 30-1 at 1.)

On March 24, 2016, the Governor of Indiana signed into law HEA 1337, which would have become

effective on July 1, 2016. *See* Ind. Code §16-34-4-1 *et seq.* HEA 1337 creates several new provisions and amends several others regarding Indiana's regulation of abortion and practices related to abortions. *See id.* Three aspects of HEA 1337 are challenged by PPINK in this action. The parties essentially do not dispute the key background facts related to the challenged provisions, nor do they dispute the potential consequences of these provisions for PPINK and its patients. The Court will therefore only briefly set forth the challenged provisions and summarize the background evidence related to each provision.

A. Anti-Discrimination and Information Dissemination Provisions

HEA 1337 creates Indiana Code § 16-34-4, and is entitled "Sex Selective and Disability Abortion Ban." This chapter bans abortions sought solely for certain enumerated reasons. Specifically, HEA 1337 provides that "[a] person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking" an abortion: (1) "solely because of the sex of the fetus," §§ 16-34-4-4, 16-34-4-5; (2) "solely because the fetus has been diagnosed with, or has a potential diagnosis of, Down syndrome or any other disability," §§ 16-34-4-6, 16-34-4-7; or (3) "solely because of the race, color, national origin, or ancestry of the fetus," § 16-34-4-8. The phrase "potential diagnosis" is defined as "the presence of some risk factors that indicate that a health problem may occur." Ind.

Code § 16-34-4-3. Moreover, HEA 1337 requires abortion providers to complete a form provided by ISDH that indicates, among other things, the "gender of the fetus, if detectable," and "[w]hether the fetus has been diagnosed with or has a potential diagnosis of having Down syndrome or any other disability." Ind. Code § 16-34-2-5(a)(6).

Indiana law sets forth consequences for abortion providers who violate these provisions. Currently, it is a felony to knowingly or intentionally perform an abortion that is not permitted by Indiana law, and HEA 1337 does not change this. *See* Ind. Code § 16-34-2-7(a). Moreover, HEA 1337 provides that "[a] person who knowingly or intentionally performs an abortion in violation of this chapter may be subject to: (1) disciplinary sanctions under IC 25-1-9; and (2) civil liability for wrongful death." Ind. Code § 16-34-4-9(a).

Not only does HEA 1337 preclude abortions sought solely for one of the enumerated reasons, but the associated information dissemination provision requires abortion providers to inform their patients of the anti-discrimination provisions. Specifically, abortion providers must inform their patients "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." Ind. Code § 16-34-2-1.1(a)(1)(K).

The State presents evidence that these provisions were passed in light of technological developments that allow the diagnosis or potential diagnosis of fetal disabilities to be made early in a pregnancy. In particular, cell-free fetal DNA testing is able to screen for

several genetic abnormalities, including Down syndrome, as early as ten weeks into the pregnancy. (Filing No. 54-1 at 5.) Tests such as the cell-free fetal DNA test are screening tests rather than diagnostic tests, and as such, only reveal the likelihood of genetic abnormality. (Filing No. 54-1 at 4.)

The parties are essentially in agreement that a significant number of women have sought, and will continue to seek, an abortion solely because of the diagnosis of a disability or the risk thereof. (See, e.g., Filing No. 30-1 at 2-3 (attestation from the CEO of PPINK that it has and will continue to provide abortions to women who seek an abortion "solely because of a diagnosis of fetal Down syndrome or other genetic disabilities or the possibility of such a diagnosis"); Filing No. 54 at 14-15 (citing statistics regarding the percentage of fetuses diagnosed with Down syndrome that are aborted)). Moreover, the parties agree that the number of women who will seek an abortion at least in part out of these concerns will likely increase as testing is more widely available than ever before.

B. Fetal Tissue Disposition Provisions

HEA 1337 also changes the manner in which fetal tissue must be disposed. Under current Indiana law, prior to the passage of HEA 1337, "[a] pregnant woman who has an abortion ... has the right to determine the final disposition of the aborted fetus." Ind. Code § 16-34-3-2. If the woman decides to let the facility performing the abortion dispose of the fetal tissue, Indiana regulations require that the facility bury or cremate the fetal tissue. *See* 410 I.A.C. § 35-2-1(a). Currently, if a medical facility elects to cremate fetal

tissue, it must do so by using a "crematory" or by "incineration as authorized for infectious and pathological waste." 410 I.A.C. § 35-1-3. Pathological waste includes tissues, organs, body parts, and blood or bodily fluid "that are removed during surgery, biopsy, or autopsy." Ind. Code § 16-41-16-5. Infectious waste includes pathological waste, Ind. Code § 16-41-6-4(b), and it can be destroyed through various procedures including incineration, Ind. Code § 16-41-6-3(b). Therefore, as it currently stands, the woman can determine to bury, cremate, or otherwise dispose of the fetal tissue herself, or the fetal tissue may be incinerated along with other human surgical byproducts such as organs. PPINK currently utilizes a contractor who periodically incinerates the fetal tissue along with other surgical by-products.

HEA 1337 alters the manner in which healthcare providers must handle fetal tissue in instances where the patient does not elect to retain it and dispose of it herself. It provides that "[a]n abortion clinic or health care facility having possession of an aborted fetus shall provide for the final disposition of the aborted fetus. The burial transit permit requirements of IC 16-37-3 apply to the final disposition of an aborted fetus, which must be interred or cremated." Ind. Code § 16-34-3-4(a).[1] A "burial transit permit" is a "permit for the transportation and disposition of a dead human body required under IC 16-37-3-10 or IC 16-37-3-12." Ind. Code § 23-14-31-5.

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[1] PPINK notes in its Amended Complaint that the same disposition requirements apply to fetal tissue that results from a miscarriage when that tissue is removed by an abortion clinic. (Filing No. 54-10 at 2.)

Moreover, HEA 1337 excludes "an aborted fetus or a miscarried fetus" from the definition of "infectious waste." Ind. Code § 16-41-16-4(d). This means that if a healthcare provider elects to use cremation rather than interment, the cremation of the fetal tissue must be performed at a crematory. However, the cremation of fetal tissue need not each be performed separately; HEA 1337 explicitly provides that "[a]borted fetuses may be cremated by simultaneous cremation." Ind. Code § 16-34-3-4(a). In exploring compliance with these new provisions, PPINK has been informed by the ISDH that its plan to aggregate "the products of conception in a container suitable for cremation and then, periodically, [have] the container delivered to a crematorium for final disposition" will comply with the statute. (Filing No. 54-10 at 2.)

C. Procedural History

In the operative Second Amended Complaint, PPINK maintains that several provisions of HEA 1337 are unconstitutional, and it seeks to permanently enjoin the implementation and enforcement of these provisions. (Filing No. 83 at 11.) PPINK also seeks a declaratory judgment that HEA 1337 is unconstitutional to the extent that it:

> (a) Denies the ability of a woman to obtain an abortion during the first trimester of her pregnancy for the reasons noted in Ind. Code § 16-34-4-5 through Ind. Code § 16-34-4-8;

> (b) Requires as part of the "informed consent" process that women seeking abortions be informed that they are unable to obtain an abortion if their sole reason for doing so is because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having a disability; and
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> (c) Requires fetal tissue after a first trimester abortion or a miscarriage to be treated by the abortion provider differently than other medical material.

(Filing No. 83 at 11). Following extensive briefing and oral argument, the Court granted PPINK's Motion for Preliminary Injunction, (Filing No. 7), concluding that PPINK was likely to succeed on the merits of its claims, (Filing No. 62).

PPINK and the State have cross-moved for summary judgment. (Filing No. 73; Filing No. 75.) Those motions are now fully briefed and ripe for the Court's review.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, the court reviews the record in the light most favorable to the nonmoving party and draws all reasonable inferences in that

party's favor. *Zerante*, 555 F.3d at 584; *Anderson*, 477 U.S. at 255.

The party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion, and identifying "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (noting that when the non-movant has the burden of proof on a substantive issue, specific forms of evidence are not required to negate a non-movant's claims in the movant's summary judgment motion, and that a court may grant such a motion, "so long as whatever is before the district court demonstrates that the standard...is satisfied"); *see also* Fed. R. Civ. P. 56(c)(1)(A) (noting additional forms of evidence used in support or defense of a summary judgment motion, including "depositions, documents electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials").

Thereafter, a nonmoving party who bears the burden of proof on a substantive issue may not rest on its pleadings, but must affirmatively demonstrate by specific factual allegations that there is a genuine issue of material fact that requires trial. *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007); *Celotex Corp.*, 477 U.S. at 323-24; Fed. R. Civ. P. 56(c)(1). Neither the mere existence of some alleged factual dispute between the parties nor the existence of some "metaphysical doubt" as to the material facts is sufficient to defeat a motion for summary judgment. *Chiaramonte v. Fashion Bed Grp., Inc.*, 129

F.3d 391, 395 (7th Cir.1997); *Anderson*, 477 U.S. at 247-48; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which [it] relies." *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1104 (7th Cir.2008).

Similarly, a court is not permitted to conduct a paper trial on the merits of a claim and may not use summary judgment as a vehicle for resolving factual disputes. *Ritchie v. Glidden Co., ICI Paints World-Grp.*, 242 F.3d 713, 723 (7th Cir.2001); *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). Indeed, a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts. *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir.2003) (highlighting that "these are jobs for a factfinder"); *Hemsworth*, 476 F.3d at 490. When ruling on a summary judgment motion, a court's responsibility is to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial. *Id.*

III. DISCUSSION

The Court previously addressed all issues presented in this litigation in the Order preliminarily enjoining enforcement of the challenged sections of HEA 1337. (Filing No. 61.) Upon review of the parties' summary judgment briefing, a completely developed factual record, and the applicable legal authorities, the Court's view of the appropriate final determination of

these issues remains unchanged. Drawing substantially from the Court's prior Order, (Filing No. 61), significant portions of which are incorporated herein, the Court modifies and extends that analysis only to the extent necessitated by the parties' additional arguments.

A. Anti-Discrimination Provisions

PPINK contends that the anti-discrimination provisions clearly violate well-established Supreme Court precedent in that they prohibit women from obtaining an abortion prior to fetal viability. (Filing No. 74 at 2.) The State posits that HEA 1337 represents a "qualitatively new kind of [abortion] statute," and, as such, it argues that the Supreme Court precedents on which PPINK relies do not address, and therefore do not govern, the constitutionality of these provisions. (Filing No. 76 at 11.)

"It is a constitutional liberty of the woman to have some freedom to terminate her pregnancy." *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). This right is grounded in the right to privacy rooted in "the Fourteenth Amendment's concept of personal liberty." *Roe v. Wade*, 410 U.S. 113, 153 (1973); *see Casey*, 505 U.S. at 846 ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment"). This right was first articulated in *Roe* but has since been repeatedly reexamined by the Supreme Court. Despite the Supreme Court's frequent revisiting of the issue, certain core principles have essentially remained unchanged since *Casey*, where a plurality of

the Supreme Court reaffirmed *Roe*'s essential holding. *Casey*, 505 U.S. at 846. The essential holding of *Roe* has three parts:

> First is a recognition of the right of the woman to choose to terminate a pregnancy before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman" life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Casey, 505 U.S. at 846.[2]

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[2] Although a plurality of the justices articulated these principles in *Casey*, subsequent Supreme Court decisions have recognized and applied these principles when considering challenges to abortion laws. *See Gonzales v. Carhart*, 550 U.S. 124, 145-46 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 920, 120 (2000). In *Stenberg*, for example, a majority of the Supreme Court characterized these principles as "established" and applied them as such to Nebraska's partial birth abortion ban. 530 U.S. at 921. More recently, in *Gonzales*, the Supreme Court only "assume[d]" that these principles governed. 550 U.S. at 146. Nevertheless, federal courts have recognized that this assumption merely signaled that the Supreme Court may be open to reevaluating those

The anti-discrimination provisions of HEA 1337 clearly violate the first of these principles, in that they prevent women from obtaining abortions before fetal viability. The woman's right to choose to terminate a pregnancy pre-viability is categorical: "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 870, 879 ("Before [viability] the woman has a right to choose to terminate her pregnancy."); *Stenberg*, 530 U.S. at 920 (same); *Gonzales*, 550 U.S. at 146 (same). As stated by the Seventh Circuit, "the constitutional right to obtain an abortion is a right against coercive governmental burdens; the government may not 'prohibit any woman from making the ultimate decision to terminate her pregnancy' before fetal viability." *Planned Parenthood of Ind.*, 699 F.3d at 987 (7th Cir. 2012) (quoting *Casey*, 505 U.S. at 874, 879).

Given the categorical nature of this principle, circuit courts have consistently held that any type of out-

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principles in the future, not that those principles no longer represented the governing law. *See, e.g., MKB Management Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015) (acknowledging that in *Gonzales* the Supreme Court only "assume[d]" *Casey*'s principles governed, but reasoning that "[e]ven so, the [Supreme Court] has yet to overrule the *Roe* and *Casey* line of cases. Thus we, as an intermediate court, are bound by those decision."). Indeed, the Seventh Circuit has treated these principles as binding precedent. *See Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Dep't of Health*, 699 F.3d 962, 987 (7th Cir. 2012). Perhaps because of this, the parties do not dispute that the principles articulated in *Casey* and subsequently applied in *Stenberg* and *Gonzales* constitute binding precedent.

right ban on pre-viability abortions is unconstitutional. *See MKB Management Corp.*, 795 F.3d at 773 (holding that a state law was unconstitutional because "we are bound by Supreme Court precedent holding that states may not prohibit pre-viability abortions" and the challenged law "generally prohibits abortions before viability"); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (holding that a state law was unconstitutional because its "broad[ ] effect ... is a categorical ban on *all* abortions between twenty weeks gestational age and viability," which "is directly contrary to the [Supreme] Court's central holding in *Casey* that a woman has the right to 'choose to terminate a pregnancy *before viability* and to obtain it without undue interference from the State' ") (quoting *Casey*, 505 U.S. at 846).

Nevertheless, the State attempts to accomplish via HEA 1337 precisely what the Supreme Court has held is impermissible. The anti-discrimination provisions prohibit a woman from choosing to terminate a pregnancy pre-viability if the abortion is sought solely for one of the enumerated reasons. For this Court to hold such a law constitutional would require it to recognize an exception where none have previously been recognized. Indeed, the State has not cited a single case where a court has recognized an exception to the Supreme Court's categorical rule that a woman can choose to terminate a pregnancy before viability. This is unsurprising given that it is a woman's right to *choose* an abortion that is protected, which, of course, leaves no room for the State to examine, let alone prohibit, the basis or bases upon which a woman makes her choice. *See Casey*, 505 U.S. at 846 (stating that it is a woman's "*decision* to terminate her pregnancy"

that is protected by the Fourteenth Amendment) (emphasis added); *id.* at 879 ("A State may not prohibit any woman from *making the ultimate decision* to terminate her pregnancy before viability.") (emphasis added).

The State resists this conclusion on multiple bases. First, the State casts the anti-discrimination provisions as the next iteration of our society's prohibition on discrimination. The State points to technological advances allowing earlier and more accurate information regarding whether a fetus has a diagnosis or potential diagnosis of Down syndrome or other disabilities. These technological advances, says the State, have led in part to an increase in the number of abortions sought for reasons related to those disabilities. Because the Supreme Court has recognized that the State has a legitimate interest in protecting potential life even from the outset of a pregnancy, the State maintains that the anti-discrimination provisions simply further its interest in protecting the potential life from discrimination.

The State is correct that the Supreme Court has consistently recognized that "the State has legitimate interests from the outset of the pregnancy in protecting ... the life of the fetus that may become a child." *Casey*, 505 U.S. at 846. But while this is true, the State simply ignores that the Supreme Court in *Casey* "struck a balance" between this interest and a woman's liberty interest in obtaining an abortion. *Gonzales*, 550 U.S. at 146. These interests weigh differently depending on whether the fetus is viable. Before viability, the Supreme Court made clear that "the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846, 869,

("[a]t a later point in fetal development,"—namely, viability—"the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.").

Therefore, although the State's interest in protecting and even promoting potential life is a legitimate one, the Supreme Court has already weighed this interest against a woman's liberty interest in choosing to terminate a pregnancy and concluded that, prior to viability, the woman's right trumps the State's interest. This is the "central holding" of *Roe*, and the State's position would require this Court to undermine that holding, which of course it cannot do. *See Stenehjem*, 795 F.3d at 772 ("[t]he [Supreme Court] has yet to overrule the *Roe* and *Casey* line of cases," and thus all federal courts "are bound by those decisions"). Accordingly, the State's focus on the technological developments since *Roe* and *Casey* are unpersuasive, and indeed irrelevant. This case is not about technological developments, but rather about a woman's liberty interest weighed against the State's interest in potential life. Developments in technology related to disability screening and the consequences that flow from those developments do not give this Court license to reevaluate the Supreme Court's judgment as to the balancing of these interests.

Second, the State advances a so-called "binary choice" interpretation of *Roe* and *Casey*, which, if accepted, would support the State's position that "HEA 1337 does not interfere with a right protected by *Roe* and *Casey*." (Filing No. 76 at 26.) The State's argument begins with the woman's liberty interest as articulated in *Casey*: "the right of the *individual* ... to be free from unwarranted governmental intrusion into

matters so fundamentally affecting a person as the decision whether *to bear or beget a child*." (Filing No. 76 at 26, citing *Casey*, 505 U.S. at 851 (emphasis added)). According to the State,

> both the woman's rights and the State's interests are different if the pregnant woman decides she wants a baby generally, but not the particular baby she happens to be carrying. A woman has already decided to bear a child. Although her privacy and liberty interests have not completely evaporated, those rights are not as central as they once were.

(Filing No. 76 at 26).

The difficulty with the State's position is that there is nothing in *Roe* or *Casey* that limits the right to terminate a pregnancy pre-viability to women who do not want to have a child *ever* as opposed to those who do not want to see a particular pregnancy through to birth. The quote from *Casey* on which the State relies certainly does not establish that a woman's right to decide whether to bear a child refers to the decision to have a child generally, rather than whether to continue a specific pregnancy. And the State does not cite a single legal authority that has recognized its binary choice theory or its proffered interpretation of *Roe* or *Casey*.

The lack of authority supporting the State's position likely stems from the fact that it is contrary to the core legal rights on which a woman's right to choose to terminate her pregnancy prior to viability are predicated. The Supreme Court has mandated that this right stems from a liberty right protected by

the Fourteenth Amendment—specifically, a woman's right to *privacy*. *See Roe*, 410 U.S. at 153. Such a right "includes the interest in independence in making certain kinds of important decisions," such as whether to terminate a pregnancy. *Casey*, 505 U.S. at 859 (citation and quotation marks omitted). PPINK's claim is based on an infringement of this privacy right—the woman's right to make the important, personal, and difficult decision of whether to terminate her pregnancy. As stated above, the Supreme Court has weighed this right against the State's interest in protecting potential life and determined that the woman's privacy right—although "not ... unlimited"—is strong enough pre-viability to preclude the State from preventing her "from making the ultimate decision to terminate her pregnancy before viability." *Id.* at 879.

Under the State's theory, a woman either wants to have a child or does not; and, once a woman chooses the former, she cannot then terminate her pregnancy for reasons, whatever they may be, that the State deems improper. But the very notion that, pre-viability, a State can examine the basis for a woman's choice to make this private, personal and difficult decision, if she at some point earlier decided she wants a child as a general matter, is inconsistent with the notion of a right rooted in privacy concerns and a liberty right to make independent decisions. The State's theory is also contrary to the reality that the decision to terminate a pregnancy involves "intimate views with infinite variations." *Id.* at 853.

To summarize, nothing in *Roe*, *Casey*, or any other subsequent Supreme Court decisions suggests that a woman's right to choose an abortion prior to viability

can be restricted if exercised for a particular reason determined by the State. The right to a pre-viability abortion is categorical. Indeed, the Seventh Circuit has described "the mother's right to abort a fetus that has not yet become viable [as] essentially absolute." *Coe v. County of Cook*, 162 F.3d 491, 493 (7th Cir.1998). This is because, despite the State's legitimate interest in potential life during the entirety of the pregnancy, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Casey*, 505 U.S. at 846. The Supreme Court has already balanced the parties' interests and concluded that the State's pre-viability interests are simply not strong enough for it to lawfully prohibit pre-viability abortions. Yet HEA 1337 does just that.

Accordingly, the Court concludes that the anti-discrimination provisions of HEA 1337 are unconstitutional.

B. Information Dissemination Provision

HEA 1337 also requires abortion providers to inform their patients "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." Ind. Code § 16-34-2-1.1(a)(1)(K). Simply put, this provision requires abortion providers to inform patients of the anti-discrimination provisions discussed above.

PPINK maintains that requiring abortion providers to disseminate and patients to listen to this information violates their First Amendment rights regarding compelled speech and compelled listening, respectively. As the parties point out, the Seventh Circuit has not yet determined what level of scrutiny applies to the type of professional speech at issue here. (Filing No. 74 at 19-20; Filing No. 76 at 29-30.) The Court need not determine, however, what level of scrutiny applies, because the parties agree that in the event that the Court holds the anti-discrimination provisions to be unconstitutional, the information dissemination provision is likewise unconstitutional. (Filing No. 74 at 20; Filing No. 76 at 30.)

Having concluded that the anti-discrimination provisions violate the Fourteenth Amendment, the Court likewise concludes that Ind. Code § 16-34-2-1.1(a)(1)(K) is unconstitutional.

C. Fetal Tissue Disposition Provisions

PPINK's final challenge is to the new fetal tissue disposition provisions created by HEA 1337. PPINK contends that these requirements violate substantive due process and equal protection principles.[3]

The parties agree that the fetal tissue disposition provisions do not implicate a fundamental right. When a fundamental right is not at stake, substantive due process still creates "a residual substantive limit

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[3] Because the Court concludes that the requirements violate substantive due process principles, it need to reach the equal protection issue.

on government action which prohibits arbitrary deprivations of liberty." *Hayden ex rel. A.H. v. Greensburg Community Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014). A law will survive such a challenge if the State can "demonstrate that the intrusion upon ... liberty is rationally related to a legitimate government interest." *Id.*; *Charleston v. Bd. of Trustees of Univ. of Ill. at Chi.*, 741 F.3d 769, 774 (7th Cir.2013) ("Substantive due process requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational."). It is ultimately the plaintiff's burden to demonstrate that the challenged law "lacks a rational relationship with a legitimate government interest; it is not the [government's] obligation to prove rationality with evidence." *Hayden*, 743 F.3d at 576. The plaintiff's burden is a "heavy one: So long as there is any conceivable state of facts that supports the policy, it passes muster under the due process clause; put another way, only if the policy is patently arbitrary would it fail." *Id.*

The State describes its interest as "treating fetal remains the same as other human remains," (Filing No. 76 at 30), or alternatively, "the humane disposal of fetal remains," (Filing No. 76 at 35). PPINK argues that this asserted interest is insufficient because the State has no legitimate interest in ensuring that abortion providers treat fetal tissue in the same manner as human remains. Specifically, PPINK maintains that the State's asserted interest would require this Court "to make a leap that the Supreme Court has refused to take. Namely, to decide that human life begins at conception and that a fetus is a human being." (Filing No. 74 at 21.)

The Court concludes that the State's asserted interest is not legitimate. As the Seventh Circuit has noted, the Supreme Court and the circuit courts applying Supreme Court precedent have unequivocally held that for purposes of the Fourteenth Amendment, a fetus is not a "person." *See Coe* 162 F.3d at 495 (citing *Roe*, 410 U.S. at 158; *Casey*, 505 U.S. at 912 [Stevens, J., concurring]; *Reed v. Gardner*, 986 F.2d 1122, 1128 (7th Cir. 1993); *Alexander v. Whitman*, 114 F.3d 1392, 1400 (3d Cir.1997); *Crumpton v. Gates*, 947 F.2d 1418, 1421 (9th Cir.1991)). As such, the Court can find no legal basis for the State to require health care providers to treat fetal remains in the same manner as human remains. Stated otherwise, if the law does not recognize a fetus as a person, there can be no legitimate state interest in requiring an entity to treat an aborted fetus *the same* as a deceased human.

The State points to other state and federal statutes as being "full of provisions that equate even a non-viable fetus with a human being," arguing that these statutes are analogous, and that the State's asserted interest is therefore legitimate. (Filing No. 76 at 30-33.) What those statutes do not share in common with the present law, however, is that they concern circumstances in which the State seeks to promote respect for potential life. No potential life is at issue in this provision. Absent a potential life, this Court would have to determine that fetal tissue is in some respects the equivalent of human remains for the State's interest to be legitimate. This would be quite similar to a recognition that a fetus is a person, an affirmation which this Court is not allowed to make. As explained by the Seventh Circuit, the con-

clusion in *Roe* that a fetus is not a person "follows inevitably from the decision to grant women a right to abort. If even a first-trimester fetus is a person, surely the state would be allowed to protect him from being killed ...." *Coe*, 162 F.3d at 495.

The State also argues that "respectful treatment of fetal remains also stems from cultural and religious traditions," and it cites to Hindu, Buddhist, and Christian practices that "treat deceased fetuses as persons." (Filing No. 76 at 34.) Aside from the obvious entanglement of church and state suggested by this argument, it also ignores the fact that the law as it existed prior to the passage of HEA 1337 allowed individuals ample leeway to vindicate their own relevant religious or cultural practices. A patient was permitted to take possession of the fetal tissue, whether the result of an abortion or a miscarriage, and dispose of it in whatever manner she chose, including in accordance with her particular religious or cultural beliefs.

Second, the State boldly contends that it is a "biological fact" that embryonic fetal tissue is a "human being." (Filing No. 76 at 30.) The Supreme Court, however, has not reached the same conclusion. Whether or not an individual views fetal tissue as essentially the same as human remains is each person's own personal and *moral* decision. *Cf. Roe*, 410 U.S. at 159 ("[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."); *Casey*, 505 U.S. at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of

the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."). The Court cannot resolve this moral question. But as a legal question, there is currently no basis which would allow this Court to recognize fetal tissue as a human being, and therefore analogous to human remains.

Notably, courts that have upheld requirements regarding the disposition of fetal tissue have done so by recognizing a legitimate state interest in ensuring the sanitary disposal of fetal tissue.[4] *See, e.g., Leigh v. Olson*, 497 F.Supp. 1340, 1351 (D.N.D.1980) (recognizing that there is a legitimate state interest in regulating "the disposal of dead fetuses to protect the public health"). But the State does not attempt to justify the fetal tissue disposition provisions on this basis, likely because Indiana statutes already require that fetal tissue be disposed of in a sanitary manner.

In sum, the Court can find no legal support for the State's position that it has a legitimate interest in "treating fetal remains the same as other human remains." (Filing No. 76 at 35.) The Supreme Court has made clear that a fetus is not legally a person, but the State's asserted interests are essentially that fetal tis-

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[4] A fetal tissue disposition statute was upheld in *Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479 (8th Cir. 1990), but in that case the plaintiff "concede[d] the state has a legitimate interest in protecting public sensibilities." *Id.* at 488. Not only was no similar concession made here, but the State's asserted legitimate interest is meaningfully different in this case. For both of these reasons, the Eighth Circuit's decision is of no persuasive value here.

sue should be treated similarly to human remains because they are like human remains. Although the Supreme Court has recognized a legitimate governmental interest in promoting the life of a fetus during a pregnancy, such an interest is always tethered to the notion that the fetus represents a potential life and the State can legitimately promote respect for that potentiality. The Supreme Court has extended these principles no further than that, and the State has not provided a basis so that this Court can do otherwise. Therefore, any legitimate interest the State has in a potential life during a pregnancy is no longer present once the pre-viability pregnancy is terminated; and thus, it does not have a legitimate state interest in treating fetal tissue similarly to human remains.

Even if the Court were to conclude that the State had a legitimate interest in treating embryonic and fetal tissue "the same as other human remains," the disposition provision is not rationally related to that purpose, because in most respects, it does not treat fetal tissue in the same manner that it treats human remains. First, it allows patients to take possession of the fetal tissue and imposes no restrictions whatsoever on the manner in which they choose to dispose of that tissue. The same is not true of the disposition of human remains, which are subject to numerous requirements regarding burial and cremation. For example, state law enumerates the permitted dispositions of human bodies, including, *inter alia*, interment in an established cemetery, disposal of cremated human remains on the property of a consenting owner or an uninhabited public land, or burial at sea. Ind. Code § 25-15-2-7. State law also provides, with great

specificity, details regarding burial, such as the minimum depth at which human remains must be buried, and proper ventilation if remains are placed in a mausoleum. *See, e.g.*, Ind. Code §§ 34-14-54-2, 23-14-54-3. Second, the provision allows for the simultaneous cremation of fetal tissue from an unspecified number of patients. Simultaneous cremation is only permitted for human remains if consented to in writing by the authorizing agent(s). Ind. Code § 23-14-31-39(a).[5] The Court sees no rational relationship between the State's purported goal—treating fetal tissue like human remains—and the law as written, given that it permits both the release of fetal tissue to patients with no restrictions whatsoever, and the mass cremation of fetal tissue.

For the reasons above, the Court concludes that the challenged disposition provisions violate the Fourteenth Amendment to the U.S. Constitution.

IV. CONCLUSION

The United States Supreme Court has stated in categorical terms that a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability. It is clear and undisputed that unless *Roe v. Wade* and *Planned*

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[5] As PPINK highlights, it was already disposing of fetal tissue by utilizing professional, regulated removal companies to collect and incinerate it. (Filing No. 74 at 22.) The two major changes instituted by HEA 1337 are that it requires PPINK to use crematories, rather than facilities that handle medical tissue, and that PPINK is required to take possession of the ashes after cremation (at which time, presumably, it may dispose of those in any manner permitted by statute). (Filing No. 74 at 22.)

Parenthood of Se. Pa. v. Casey are overturned by the United States Supreme Court, this Court is bound to follow that precedent under the rule of *stare decisis*. *See Casey*, 505 U.S. at 870 (stating that the doctrine of stare decisis requires reaffirmance of *Roe's* essential holding recognizing a woman's right to choose an abortion before fetal viability); *MKB Mgmt. Corp. v. Burdick*, 954 F.Supp.2d 900 (D.N.D.2013) ("[n]o judge in the United States can overrule *Roe v. Wade*; only the Supreme Court can do so"); *Sojourner v. Roemer*, 772 F.Supp. 930, 932 (E.D. La. 1991).

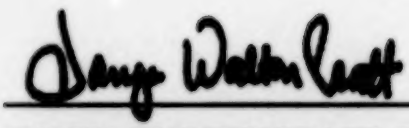
The challenged anti-discrimination provisions directly contravene well-established law that precludes a state from prohibiting a woman from electing to terminate a pregnancy prior to fetal viability. The information dissemination provision is also unconstitutional, as it requires abortion providers to convey false information regarding the anti-discrimination provisions to their patients. The fetal tissue disposition provisions do not further a legitimate state interest and are therefore also unconstitutional.

Accordingly, PPINK's Motion for Summary Judgment, (Filing No. 73), is **GRANTED**, and the State's Motion for Summary Judgment, (Filing No. 75), is **DENIED**.

The Court **ISSUES A PERMANENT INJUNCTION** prohibiting the State from enforcing the following provisions of HEA 1337: the anti-discrimination provisions, Indiana Code §§ 16-34-4-4, 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8, the information dissemination provision, Indiana Code § 16-34-2-1.1(a)(1)(K), and the fetal tissue disposition provisions.

SO ORDERED.

Date: 9/22/2017



TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., DR. MARSHALL LEVINE, M.D.,	)	Case No. 1:16-cv-00763-TWP-DML
Plaintiffs,	)	
v.	)	
COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH in his official capacity, *et al.*,	)	
Defendants.	)	

ENTRY GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on a Motion for Preliminary Injunction filed pursuant to Federal Rule of Civil Procedure 65(a) by Plaintiffs Planned Parenthood of Indiana and Kentucky, Inc. and Dr. Marshall Levine (collectively "PPINK"). (Filing No. 7.) PPINK filed this suit against the Commissioner of the Indiana State Department of Health ("ISDH"), the prosecutors of Marion County, Lake County, Monroe County, and Tippecanoe County, and members of the Medical Licensing Board of Indiana (collectively "the State"), all in their official capacities.

On March 24, 2016, the Governor of Indiana signed into law House Enrolled Act No. 1337 ("HEA 1337"), which creates new regulations of abortion and practices related to abortion. PPINK maintains that several provisions of HEA 1337 are unconstitutional, and it seeks to enjoin the implementation and enforcement of these provisions during the pendency of this litigation and prior to July 1, 2016, the date on which the provisions take effect. PPINK seeks a preliminary injunction as to three aspects of HEA 1337: (1) the anti-discrimination provisions, which preclude abortions if sought solely for certain reasons enumerated in the statute such as the fetus's race, sex, or disability; (2) the information dissemination provision, which requires abortion providers to inform their patients of the anti-discrimination provisions and the types of abortions those provisions prohibit; and (3) the fetal tissue disposition provisions, which require fetal tissue to be disposed of in a manner similar to that of human remains.

The parties submitted evidence, and the Court held a hearing on PPINK's Motion. For the reasons that follow, PPINK is entitled to an injunction as to all of the challenged provisions. PPINK is likely to succeed on the merits of its challenge to the anti-discrimination provisions because they directly contravene the principle established in *Roe v. Wade*, 410 U.S. 113 (1973), that a state may not prohibit a woman from making the ultimate decision to have an abortion prior to fetal viability. Similarly, the information dissemination provision is likely unconstitutional as it requires abortion providers to convey almost certainly false information to their patients. In

addition, PPINK faces irreparable harm of a significantly greater magnitude if these provisions are not enjoined than that faced by the State from an injunction.

PPINK's challenges to the fetal tissue disposition provisions present a much closer call and present difficult legal questions about which there are few clear answers. In the end, however, the Court concludes that the State's asserted interest in treating fetal remains with the dignity of human remains is not legitimate given that the law does not recognize a fetus as a person. Therefore, PPINK has a strong likelihood of success on its substantive due process challenge to these provisions as well. Because the balance of harms also favors PPINK regarding this claim, PPINK has demonstrated that the Court should enjoin the fetal tissue disposition provisions pending resolution of this litigation.

Accordingly, PPINK's Motion for Preliminary Injunction is **GRANTED** (Filing No. 7).

I. LEGAL STANDARD

A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

> To obtain a preliminary injunction, a party must establish [1]that it is likely to succeed on the merits, [2] that it is likely to suffer irreparable harm in the absence of preliminary relief,

> [3] that the balance of equities tips in its favor, and [4] that issuing an injunction is in the public interest.

Grace Schools v. Burwell, 801 F.3d 788, 795 (7th Cir. 2015); *Winter*, 555 U.S. at 20. "The court weighs the balance of potential harms on a 'sliding scale' against the movant's likelihood of success: the more likely he is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor." *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). "The sliding scale approach is not mathematical in nature, rather it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief." *Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 678 (7th Cir. 2012) (citation and internal quotation marks omitted). "Stated another way, the district court 'sit[s] as would a chancellor in equity' and weighs all the factors, 'seeking at all times to minimize the costs of being mistaken.'" *Id.* (quoting *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)).

II. BACKGROUND

PPINK is a non-profit healthcare provider which offers reproductive healthcare, family planning, and preventive primary-care services. It operates twenty-three health centers in Indiana and two in Kentucky. Three of the Indiana health centers, located in Bloomington, Merrillville, and Indianapolis, provide surgical abortion services to patients. Surgical abortions

are available at these centers only through the first trimester of pregnancy. Plaintiff Dr. Levine is one of the physicians who provides surgical abortions for PPINK.

The Indiana legislature recently passed HEA 1337, which becomes effective on July 1, 2016. HEA 1337 creates several new provisions and amends several others regarding Indiana's regulations of abortion and practices related to abortions. Three aspects of HEA 1337 are challenged by PPINK in this action. The parties essentially do not dispute the key background facts related to the challenged provisions, nor do they dispute the potential consequences of these provisions for PPINK and its patients. The Court will therefore briefly set forth the challenged provisions and summarize the background evidence related to each provision.

A. Anti-Discrimination and Information Dissemination Provisions

HEA 1337 creates Indiana Code § 16-34-4, and is entitled "Sex Selective and Disability Abortion Ban." This provision bans abortions sought solely for certain enumerated reasons. Specifically, HEA 1337 provides that "[a] person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking" an abortion: (1) "solely because of the sex of the fetus," §§ 16-34-4- 4, 16-34-4-5; (2) "solely because the fetus has been diagnosed with, or has a potential diagnosis of, Down syndrome or any other disability," §§ 16-34-4- 6, 16-34-4-7; or (3) "solely

because of the race, color, national origin, or ancestry of the fetus," § 16-34-4-8. The phrase "potential diagnosis" is defined as "the presence of some risk factors that indicate that a health problem may occur." Ind. Code § 16-34-4-3. Moreover, HEA 1337 requires abortion providers to complete a form provided by ISDH that indicates, among other things, the "gender of the fetus, if detectable," and "[w]hether the fetus has been diagnosed with or has a potential diagnosis of having Down syndrome or any other disability." Ind. Code § 16-34-2-5(a)(6).

Indiana law sets forth consequences for abortion providers who violate these provisions. Currently, it is a felony to knowingly or intentionally perform an abortion that is not permitted by Indiana law, and HEA 1337 does not change this. *See* Ind. Code § 16-34-2-7(a). Moreover, HEA 1337 provides that "[a] person who knowingly or intentionally performs an abortion in violation of this chapter may be subject to: (1) disciplinary sanctions under IC 25-1-9; and (2) civil liability for wrongful death." Ind. Code § 16-34-4- 9(a).

Not only does HEA 1337 preclude abortions sought solely for one of the enumerated reasons, but the information dissemination provision requires abortion providers to inform their patients of the anti-discrimination provisions. Specifically, abortion providers must inform their patients "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." Ind. Code § 16-34-2-1.1(a)(1)(K).

The State presents evidence that these provisions were passed in light of technological developments

that allow the diagnosis or potential diagnosis of fetal disabilities to be made early in a pregnancy. In particular, Cell-free fetal DNA testing is able to screen for several genetic abnormalities, including Down syndrome, as early as ten weeks into pregnancy. Tests such as the Cell-free fetal DNA test are screening tests rather than diagnostic tests, and as such, only reveal the likelihood of genetic abnormality.

The parties are essentially in agreement that a significant number of women have sought, and will continue to seek, an abortion solely because of the diagnosis of a disability or the risk thereof. (*See, e.g.*, Filing No. 30-1 at 2-3) (attestation from the CEO of PPINK that it has and will continue to provide abortions to women who seek an abortion "solely because of a diagnosis of fetal Down syndrome or other genetic disabilities or the possibility of such a diagnosis"); Filing No. 54 at 14-15 (citing statistics regarding the percentage of fetuses diagnosed with Down syndrome that are aborted)). Moreover, the parties agree that the number of women who will seek an abortion at least in part out of these concerns will likely increase as testing is more widely available than ever before.

B. Fetal Tissue Disposition Provisions

HEA 1337 also changes the manner in which fetal tissue must be disposed. Under current Indiana law, "[a] pregnant woman who has an abortion . . . has the right to determine the final disposition of the aborted fetus." Ind. Code § 16-34-3-2. If the woman decides to let the facility performing the abortion dispose of the

fetal tissue, Indiana regulations require that the facility bury or cremate the fetal tissue. *See* 410 I.A.C. § 35-2- 1(a).

Currently, if a medical facility elects to cremate fetal tissue, it must do so by using a "crematory" or by "incineration as authorized for infectious and pathological waste." 410 I.A.C. § 35-1-3. Pathological waste includes tissues, organs, body parts, and blood or bodily fluid "that are removed during surgery, biopsy, or autopsy." Ind. Code § 16-41-16-5. Infectious waste includes pathological waste, Indiana Code § 16-41-6-4(b), and it can be destroyed through various procedures including incineration, Indiana Code § 16-41-6-3(b). Therefore, as it currently stands, the woman can determine to bury, cremate, or otherwise dispose of the fetal tissue herself, or the fetal tissue may be incinerated along with other human surgical byproducts such as organs. PPINK currently utilizes a contractor who periodically incinerates the fetal tissue along with other surgical byproducts.

HEA 1337 alters the manner in which healthcare providers must handle fetal tissue in instances where the patient does not elect to retain it and dispose of it herself. It provides that "[a]n abortion clinic or health care facility having possession of an aborted fetus shall provide for the final disposition of the aborted fetus. The burial transit permit requirements of IC 16-37-3 apply to the final disposition of an aborted fetus, which must be interred or cremated." Ind. Code § 16-34-3-4(a). A "burial transit permit" is "a permit for the transportation and disposition of a dead human body required under IC 16-37-3-10 or IC 16-37-3-12." Ind. Code § 23-14-31-5.

Moreover, HEA 1337 excludes "an aborted fetus or a miscarried fetus" from the definition of "infectious waste." Ind. Code § 16-41-16-4(d). This means that if a healthcare provider elects to use cremation rather than interment, the cremation of the fetal tissue must be performed at a crematory. However, the cremation of fetal tissue need not each be performed separately; HEA 1337 explicitly provides that "[a]borted fetuses may be cremated by simultaneous cremation." Ind. Code § 16-34-3-4(a). In exploring compliance with these new provisions, PPINK has been informed by the ISDH that its plan to aggregate "the products of conception in a container suitable for cremation and then, periodically, [have] the container delivered to a crematorium for final disposition" will comply with the statute (Filing No. 54-10 at 2).

PPINK produced evidence that compliance with the new fetal tissue disposition provisions will result in a meaningful increase in its expenses. Specifically, the annual cost of disposing fetal tissue will increase from its current level of $15,500.00, to between $36,000.00 and $63,000.00, and there will be an additional up front cost of $5,000.00 to $9,000.00 for PPINK to purchase a crypt at a cemetery and to periodically open and close the crypt to deposit the cremains (Filing No. 57-2 at 3-4).

III. DISCUSSION

To obtain a preliminary injunction, PPINK must establish the following four factors as to each provision it seeks to enjoin: (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the

balance of equities tips in its favor, and (4) that issuing an injunction is in the public interest. *Grace Schools*, 801 F.3d at 795. The first two factors are threshold determinations; "[i]f the moving party meets these threshold requirements, the district court 'must consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied.'" *Stuller*, 695 F.3d at 678(quoting *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). The Court will address the first two threshold factors before addressing the final factors that it must consider.

A. Likelihood of Success on the Merits

PPINK raises constitutional challenges to three provisions of HEA 1337, which are addressed in turn.

1. Anti-Discrimination Provisions

PPINK contends that the anti-discrimination provisions clearly violate well-established Supreme Court precedent in that they prohibit women from obtaining an abortion prior to fetal viability. The State acknowledges that HEA 1337 represents a "qualitatively new kind of abortion statute," and, as such, it argues that the Supreme Court precedents on which PPINK relies do not address, and therefore, do not govern the constitutionality of these provisions (Filing No. 54 at 11).

"It is a constitutional liberty of the woman to have some freedom to terminate her pregnancy." *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). This

right is grounded in the right to privacy rooted in "the Fourteenth Amendment's concept of personal liberty." *Roe*, 410 U.S. at 153; *see Casey*, 505 U.S. at 846 ("[c]onstitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."). This right was first articulated in *Roe* but has since been repeatedly re-examined by the Supreme Court. Despite the Supreme Court's frequent revisiting of the issue, certain core principles have essentially remained unchanged since *Casey*, where a plurality of the Supreme Court reaffirmed *Roe*'s essential holding. 505 U.S. at 846. The essential holding of *Roe* has three parts:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Id.[1]

The anti-discrimination provisions of HEA 1337 clearly violate the first of these principles in that they prevent women from obtaining certain abortions before fetal viability. The woman's right to choose to have an abortion pre-viability is categorical; "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before via-

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[1] Although only a plurality of the Supreme Court articulated these principles in *Casey*, subsequent Supreme Court decisions have recognized and applied these principles when considering challenges to abortion laws. *See Gonzales v. Carhart*, 550 U.S. 124, 145-46 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000). In *Stenberg*, for example, a majority of the Supreme Court characterized these principles as "established" and applied them as such to Nebraska's partial birth abortion ban. 530 U.S. at 921. More recently, in *Gonzales*, the Supreme Court only "assume[d]" that these principles governed. 550 U.S. at 146. Nevertheless, federal courts have recognized that this assumption merely signaled that the Supreme Court may be open to re-evaluating those principles in the future, not that those principles no longer represented the governing law. *See, e.g., MKB Management Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015) (acknowledging that in *Gonzales* the Supreme Court only "assume[d]" *Casey*'s principles governed, but reasoning that "[e]ven so, the [Supreme Court] has yet to overrule the *Roe* and *Casey* line of cases. Thus we, as an intermediate court, are bound by those decisions"). Indeed, the Seventh Circuit has treated these principles as binding precedent. *See Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Dep't of Health*, 699 F.3d 962, 987 (7th Cir. 2012). Perhaps because of this, the parties do not dispute that the principles articulated in *Casey* and subsequently applied in *Stenberg* and *Gonzales* constitute binding precedent.

bility." *Casey*, 505 U.S. at 879; *id.* at 870 ("[b]efore [viability] the woman has a right to choose to terminate her pregnancy."); *Stenberg*, 530 U.S. at 920 (same); *Gonzales*, 550 U.S. at 146 (same). As stated by the Seventh Circuit, "the constitutional right to obtain an abortion is a right against coercive governmental burdens; the government may not 'prohibit any woman from making the ultimate decision to terminate her pregnancy' before fetal viability." *Planned Parenthood of Ind.*, 699 F.3d at 987 (7th Cir. 2012) (quoting *Casey*, 505 U.S. at 874, 879). Given the categorical nature of this principle, circuit courts have consistently held that any type of outright ban on certain pre-viability abortions is unconstitutional. *See MKB Management Corp.*, 795 F.3d at 773 (holding that a state law was unconstitutional because "we are bound by Supreme Court precedent holding that states may not prohibit pre-viability abortions" and the challenged law "generally prohibits abortions before viability"); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (holding that a state law was unconstitutional because its "broad[] effect . . . is a categorical ban on *all* abortions between twenty weeks gestational age and viability," which "is directly contrary to the [Supreme] Court's central holding in *Casey* that a woman has the right to 'choose to have an abortion *before viability* and to obtain it without undue interference from the State'") (quoting *Casey*, 505 U.S. at 846).

Nevertheless, the State attempts to accomplish via HEA 1337 precisely what the Supreme Court has held is impermissible. The anti-discrimination provisions prohibit a woman from choosing to have an abortion pre-viability if the abortion is sought solely for one of

the enumerated reasons. For this Court to hold such a law constitutional would require it to recognize an exception where none have previously been recognized. Indeed, the State has not cited a single case where a court has recognized an exception to the Supreme Court's categorical rule that a woman can choose to have an abortion before viability. This is unsurprising given that it is a woman's right to *choose* an abortion that is protected, which, of course, leaves no room for the State to examine the basis or bases upon which a woman makes her choice. *See Casey*, 505 U.S. at 846 (stating that it is a woman's "*decision* to terminate her pregnancy" that is protected by the Fourteenth Amendment) (emphasis added); *id.* at 879 ("[a] State may not prohibit any woman from *making the ultimate decision* to terminate her pregnancy before viability.") (emphasis added). Based on this categorical rule, PPINK's likelihood of success on the merits of this claim appears quite strong.

The State resists this conclusion on multiple bases. First, the State casts the anti-discrimination provisions as the next iteration of our society's prohibition on discrimination. The State points to technological advances allowing earlier and more accurate information regarding whether a fetus has a diagnosis or potential diagnosis of Down syndrome or other disabilities. These technological advances, says the State, have led in part to an increase in the number of abortions sought for reasons related to those disabilities. Because the Supreme Court has recognized that the State has a legitimate interest in protecting potential life even from the outset of a pregnancy, the

State maintains that the anti-discrimination provisions simply further its interest in protecting the potential life from discrimination.

The State is correct that the Supreme Court has consistently recognized that "the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child." *Casey*, 505 U.S. at 846. But while this is true, the State simply ignores that the Supreme Court in *Casey* "struck a balance" between this interest and a woman's liberty interest in obtaining an abortion. *Gonzales*, 550 U.S. at 146. These interests weigh differently depending on whether the fetus is viable. Before viability, the Supreme Court made clear that "the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846; *see id.* at 869 ("[a]t a later point in fetal development,"—namely, viability—"the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.").

Therefore, although the State's interest in protecting and even promoting potential life is a legitimate one, the Supreme Court has already weighed this interest against a woman's liberty interest in choosing to have an abortion and concluded that, prior to viability, the woman's right trumps the State's interest. This is the "central holding" of *Roe*, and the State's position would require this Court to undermine that holding, which of course it cannot do. *See Stenehjem*, 795 F.3d at 772 ("[t]he [Supreme Court] has yet to overrule the *Roe* and *Casey* line of cases," and thus all federal courts "are bound by those decisions"). Accordingly, the State's focus on the technological developments since *Roe* and *Casey* are unpersuasive. This

case is not about technological developments, but rather about a woman's liberty interest weighed against the State's interest in potential life. Developments in technology related to disability screening and the consequences that flow from those developments do not give this Court license to reevaluate the Supreme Court's judgment as to the balancing of these interests.

Second, the State advances a so-called "binary choice" interpretation of *Roe* and *Casey*, which, if accepted, would support the State's position that "HEA 1337 does not interfere with a right protected by *Roe* and *Casey*." (Filing No. 54 at 28.) The State's argument begins with the woman's liberty interest as articulated in *Casey*: "'the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether *to bear or beget a child*.'" *Casey*, 505 U.S. at 851 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) (second emphasis added). According to the State, "[t]his right represents a binary choice: one either chooses, free of government coercion and intrusion, to 'bear or beget a child,' or one chooses to have an abortion so as not to 'bear or beget a child.'" (Filing No. 54 at 28.) The purpose of the right, continues the State, "is to prevent women from being forced to carry a child to term, even though she does not want a child at all. *Casey* and *Roe* do not create, on the other hand, a right to abort an otherwise wanted child on a discriminatory basis." (Filing No. 54 at 29.)

The difficulty with the State's position is that there is nothing in *Roe* or *Casey* that limits the right to have an abortion pre-viability to women who do not want to have a child at all as opposed to those who do

not want to see a particular pregnancy through to birth. The quote from *Casey* on which the State relies certainly does not make clear one way or another whether a woman's right to decide whether to bear a child refers to the decision to have a child generally or whether to continue a specific pregnancy. And the State does not cite a single legal authority that has recognized its binary choice theory or its proffered interpretation of *Roe* or *Casey*.

The lack of authority supporting the State's position likely stems from the fact that it is contrary to the core legal rights on which a woman's right to choose to terminate her pregnancy prior to viability are predicated. The Supreme Court has mandated that this right stems from a liberty right protected by the Fourteenth Amendment—specifically, a woman's right to *privacy*. *See Roe*, 410 U.S. at 153. Such a right "includes the interest in independence in making certain kinds of important decisions," such as whether to terminate a pregnancy. *Casey*, 505 U.S. at 859 (citation and quotation marks omitted). PPINK's claim is based on an infringement of this privacy right—the woman's right to make the important, personal, and difficult decision of whether to terminate her pregnancy. As stated above, the Supreme Court has weighed this right against the State's interest in protecting potential life and determined that the woman's privacy right—although "not . . . unlimited"—is strong enough pre-viability to preclude the State from preventing her "from making the ultimate decision to terminate her pregnancy before viability." *Casey*, Id. at 879.

Under the State's theory, a woman either wants to have a child or does not; and, once a woman chooses

the former, she cannot then terminate her pregnancy for reasons the State deems improper. But the very notion that, pre-viability, a State can examine the basis for a woman's choice to make this private, personal and difficult decision, if she at some point earlier decided she wants a child as a general matter, is inconsistent with the notion of a right rooted in privacy concerns and a liberty right to make independent decisions.

The State's theory is also contrary to the reality that the decision to terminate a pregnancy involves "intimate views with infinite variations." *Id.* at 853. For example, PPINK points out, "under the State's theory there would be no constitutional protection for a woman who decides because of a loss of a job, dissolution of a marriage, illness of another child, personal illness, or the eruption of violence within the home, that she must end her pregnancy. The 'binary-choice' theory is therefore not tethered to the State's anti-discrimination rationale and would, if accepted, result in the State being able to prohibit any pre-viability abortion if the woman had not made the determination that she wanted an abortion at, or prior to, the moment of conception." (Filing No. 57 at 7.)

To summarize, nothing in *Roe*, *Casey*, or any other subsequent Supreme Court decisions suggests that a woman's right to choose an abortion prior to viability can be restricted if exercised for a certain reason. The right to a pre-viability abortion is categorical. Indeed, the Seventh Circuit has described "the mother's right to abort a fetus that has not yet become viable [as] essentially absolute." *Coe v. County of Cook*, 162 F.3d 491, 493 (7th Cir. 1998). This is because, despite the State's legitimate interest in potential life during the

entirety of the pregnancy, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Casey*, 505 U.S. at 846. The Supreme Court has already balanced the parties' interests and concluded that the State's pre-viability interests are simply not strong enough for it to lawfully prohibit pre-viability abortions. Yet HEA 1337 does just that. Accordingly, PPINK has a strong likelihood of success on the merits of its claim that the anti-discrimination provisions of HEA 1337 are unconstitutional.[2]

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[2] The State maintains that PPINK's challenge to the anti-discrimination provisions may be susceptible to an as-applied challenge but not to a facial challenge as a facial challenge requires PPINK to demonstrate that "'no set of circumstances exists under which the [challenged statute] would be valid.'" (Filing No. 54 at 30 (quoting *United States v. Salerno*, 481 U.S. 739 (1987))). The State is correct that a facial challenge requires the plaintiff to "establish that a law is unconstitutional in all of its applications." *City of Los Angeles, Cal. v. Patel*, 135 S. Ct. 2443, 2451 (2015). As the Supreme Court very recently made clear, "the relevant denominator" when applying this test is "those [women] for whom [the provision] is an actual rather than an irrelevant restriction." *Whole Woman's Health v. Hellerstedt*, --- S.Ct. ----, 2016 WL 3461560, at *28 (2016) (citation and quotation marks omitted). The anti-discrimination provisions prevent any woman who seeks to have a pre-viability abortion solely for one of the enumerated reasons from obtaining one. This is an irrelevant restriction for women not seeking an abortion solely for one of these reasons. It is, however, relevant to women seeking an abortion for one of the enumerated reasons, and it is very likely unconstitutional as to all of these women. As such, it is susceptible to a facial challenge.

2. Information Dissemination Provision

HEA 1337 also requires abortion providers to inform their patients "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." Ind. Code § 16-34-2-1.1(a)(1)(K). Simply put, this provision requires abortion providers to inform patients of the anti-discrimination provisions discussed above.

PPINK maintains that requiring abortion providers to disseminate and patients to listen to this information violates their First Amendment rights regarding compelled speech and compelled listening, respectively. The State contends that PPINK's First Amendment claim is entirely derivative of its Fourteenth Amendment claim, in that success on PPINK's Fourteenth Amendment claim necessarily means success on its First Amendment claim. This is because, in the State's view, the only requirement the First Amendment places on these types of regulations is that the information a physician must provide be truthful and non-misleading. Therefore, the State maintains that "[i]f . . . the Court concludes that the underlying prohibition against discriminatory abortion is unconstitutional, [it] must reluctantly concede that the required statement that such abortions are not allowed would become misleading." (Filing No. 54 at 34.)

Although PPINK does not agree that its First Amendment claim is entirely derivative of its Fourteenth Amendment claim, the parties agree that, if PPINK has a strong likelihood of success on its Four-

teenth Amendment claim, it also has a strong likelihood of success on its First Amendment claim. This is because, even under the standard more favorable to the State, the State cannot compel abortion providers to provide false information; a state can only "use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion." *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576-77 (5th Cir. 2012) (quoting *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008) (en banc)). Given the Court's conclusion that the anti-discrimination provisions very likely violate the Fourteenth Amendment, requiring abortion providers to inform their patients that the law prohibits abortions sought for those reasons would, therefore, require abortion providers to give their patients false information. Accordingly, PPINK has a strong likelihood of success on its First Amendment challenge to the information dissemination requirements.

3. Fetal Tissue Disposition Provisions

PPINK's final challenge is to the new fetal tissue disposition provisions created by HEA 1337. PPINK contends that these requirements violate substantive due process and equal protection principles. Ultimately, the Court concludes that PPINK has a strong likelihood of success on its substantive due process claim and is entitled to an injunction on this basis alone. Therefore, the Court need not reach a conclusion on the equal protection claims.

The parties agree that the fetal tissue disposition provisions do not implicate a fundamental right.

When a fundamental right is not at stake, however, substantive due process still creates "a residual substantive limit on government action which prohibits arbitrary deprivations of liberty." *Hayden ex rel. A.H. v. Greensburg Community Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014). A law will survive such a challenge if the State can "demonstrate that the intrusion upon . . . liberty is rationally related to a legitimate government interest." *Id.*; *Charleston v. Bd. of Trustees of Univ. of Ill. at Chi.*, 741 F.3d 769, 774 (7th Cir. 2013) ("[s]ubstantive due process requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational."). It is ultimately the plaintiff's burden to demonstrate that the challenged law "lacks a rational relationship with a legitimate government interest; it is not the [government's] obligation to prove rationality with evidence." *Hayden*, 743 F.3d at 576. The plaintiff's burden is a "heavy one: So long as there is any conceivable state of facts that supports the policy, it passes muster under the due process clause; put another way, only if the policy is patently arbitrary would it fail." *Id.*

The Court's analysis begins and ends with whether the State's asserted interest is legitimate.[3]

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[3] The State contends that PPINK's substantive due process claim fails because it does not "articulate[] the precise right it seeks to vindicate," as there is "'no abstract right to substantive due process . . . under the Constitution.'" (Filing No. 54 at 35 (quoting *Gen. Auto Serv. Station v. City of Chi.*, 526 F.3d 991, 1002 (7th Cir. 2008))). But as PPINK points out, substantive due process protects against any arbitrary or irrational use of government power. *See County of Sacramento v. Lewis*, 523 U.S. 833, 846

The State provides multiple formulations of the interest furthered by the fetal tissue dispositions provisions: (1) "to treat fetal remains with the same dignity as other human remains," (Filing No. 54 at 35); (2) "promoting respect for human life by ensuring proper disposal of fetal remains," (Filing No. 54 at 36); and (3) ensuring "that fetal remains be treated with humane dignity," (Filing No. 54 at 38). PPINK argues that these asserted interests are insufficient because the State has no legitimate interest in ensuring that abortion providers treat fetal tissue in the same manner as human remains. Specifically, PPINK maintains that the State's asserted interest "stems from the legally indefensible assumption that embryonic and fetal tissue at any stage in the first trimester is a human being", and to accept this as a legitimate state interest "would require this Court to make a leap that the Supreme Court has refused to take to decide that human life begins at conception and that a fetus is a human being." (Filing No. 57 at 11-12.)

As an initial matter, the Court must reject as legitimate, the State's first formulation of its asserted interest. As the Seventh Circuit has noted, the Supreme Court and the cases that follow have unequivocally held that for purposes of the Fourteenth

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(1998) ("[T]he substantive due process guarantee protects against government power arbitrarily and oppressively exercised."); *Hayden*, 743 F.3d at 576 ("[T]here is a residual substantive limit on government action which prohibits arbitrary deprivations of liberty."). Moreover, the principle on which the State relies from *General Auto Service Station* does not apply here, as cases such as that involving an alleged deprivation of a property right require the identification of a specific "protected property interest." 526 F.3d at 1002.

Amendment, a fetus is not a "person." *See Coe v. County of Cook*, 162 F.3d 491, 495 (7th Cir. 1998) (citing *Roe*, 410 U.S. at 158; *Casey*, 505 U.S. at 912 [Stevens, J., concurring]; *Reed v. Gardner*, 986 F.2d 1122, 1128 (7th Cir. 1993); *Alexander v. Whitman*, 114 F.3d 1392, 1400 (3d Cir. 1997); *Crumpton v. Gates*, 947 F.2d 1418, 1421 (9th Cir. 1991)). As such, the Court can find no legal basis for the State to treat fetal remains with "the same" dignity as human remains. Stated otherwise, if the law does not recognize a fetus as a person, there can be no legitimate state interest in treating an aborted fetus *the same* as a deceased human.

For similar reasons, the State's other two formulations of its asserted interest ultimately fare no better. Although these formulations are not premised on a fetus being *the same* as a person, they are premised on the related principle that fetal tissue is entitled to a more respectful, dignified, or humane disposition because it, like human remains, in some sense represents life. However, the State does not cite any legal authority that recognizes this premise as a legitimate state interest. Although the State points to Supreme Court cases that have recognized that the State has a legitimate interest in promoting respect for potential life, these precedents do not extend to situations such as this where the potentiality for human life no longer is present.

For example, the State relies on the Supreme Court's assertion in *Gonzales* that government "may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales*, 550 U.S. at 157; *see id.* at 163 (stating that the government has an "interest in promoting respect for

human life at all stages in the pregnancy"). Similarly, in *Casey*, the Supreme Court recognized that "the State has legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child," and that there is "a substantial state interest in potential life throughout pregnancy." 505 U.S. at 846, 876.

The difficulty with the State's reliance on these state interests, as noted above, is that they are only recognized as legitimate during the "stages in the pregnancy," *Gonzales*, 550 U.S. at 163, as this is when there is a "potential life," *Casey*, 505 U.S. at 876. As PPINK correctly points out, the Supreme Court's recognition that the government has a legitimate interest in potential life has not been extended by *Gonzales* nor any other case "to imposing procedures taken after the pregnancy has been terminated" like the fetal tissue disposition provisions do (Filing No. 57 at 13n.8). Not only do the legitimate state interests recognized by the Supreme Court not extend to the situation here, but the consistency with which the Supreme Court ties the legitimate interest to the potentiality of life. This suggests that it would not extend these principles to this context where, following an abortion, such a potentiality is no longer present.

Absent a potential life, this Court would have to determine that fetal tissue is in some respects the equivalent of human remains for the State's interest to be legitimate. This would be quite similar to a recognition that a fetus is a person, an affirmation which this Court is not allowed to make. As explained by the Seventh Circuit, the conclusion in *Roe* that a fetus is not a person "follows inevitably from the decision to grant women a right to abort. If even a first-

trimester fetus is a person, surely the state would be allowed to protect him from being killed . . . ." *Coe*, 162 F.3d at 495. The fact that recognizing a fetus as a person would undermine the right to abortion itself lends further credence to PPINK's position that the Supreme Court has intentionally not extended the legitimate state interests recognized in *Gonzales* and other cases to situations where there is no longer a potential life.

Notably, courts that have upheld requirements regarding the disposition of fetal tissue have done so by recognizing a legitimate state interest in ensuring the sanitary disposal of fetal tissue.[4] *See, e.g., Leigh v. Olson*, 497 F. Supp. 1340, 1351 (D.N.D. 1980) (recognizing that there is a legitimate state interest in regulating "the disposal of dead fetuses to protect the public health"). But the State does not attempt to justify the fetal tissue disposition provisions on this basis, likely because Indiana statutes already require that fetal tissue be disposed of in a sanitary manner.[5]

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[4] A fetal tissue disposition statute was upheld in *Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479 (8th Cir. 1990), but in that case the plaintiff "concede[d] the state has a legitimate interest in protecting public sensibilities." *Id.* at 488. Not only was no similar concession made here, but the State's asserted legitimate interest is meaningfully different in this case. For both of these reasons, the Eighth Circuit's decision is of no persuasive value here.

[5] The parties also dispute whether the Supreme Court's decision in *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983), overruled in part on other grounds by *Casey*, 505 U.S. 833, answers whether the State's asserted interest is a legitimate one. Specifically, the parties focus on a footnote in *City of Akron*, where the Supreme Court stated that, although the fetal tissue disposition statute was impermissibly vague for

In sum, the Court can find no legal support for the State's position that it has a legitimate state interest in "promoting respect for human life by ensuring proper disposal of fetal remains," (Filing No. 54 at 36), or ensuring "that fetal remains be treated with humane dignity," (Filing No. 54 at 38). The Supreme Court has made clear that a fetus is not legally a person, but the State's asserted interests are essentially that fetal tissue should be treated similarly to human remains because they are like human remains. Although the Supreme Court has recognized a legitimate governmental interest in promoting the life of a fetus during a pregnancy, such an interest is always tethered to the notion that the fetus represents a potential life and the State can legitimately promote respect for that potentiality. The Supreme Court has extended these principles no further than that, and the State has not provided a basis so that this Court can do otherwise. Therefore, any legitimate interest the State has in a potential life during a pregnancy is no longer present once the pre-viability pregnancy is terminated; and thus, it does not have a legitimate state

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a statute imposing criminal penalties, the City of Akron "remain[ed] free, of course, to enact more carefully drawn regulations that further its legitimate interest in proper disposal of fetal remains." *Id.* As an initial matter, this statement in a footnote certainly does not constitute a holding of the Supreme Court. But perhaps more importantly, it is unclear from this statement whether by using the word "proper" the Supreme Court meant in a dignified manner or a sanitary manner. After all, the statute that was struck down mandated the "humane and sanitary" disposition of fetuses. Given that the issue and type of legal challenge in this case are substantially different than those in *City of Akron*, the Court declines to give a nonbinding and opaque statement in a footnote controlling weight.

interest in treating fetal tissue similarly to human remains.

To be clear, whether or not an individual views fetal tissue as essentially the same as human remains is each person's own personal and *moral* decision. Cf. *Roe*, 410 U.S. at 159 ("[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."). The Court cannot resolve this moral question. But as a *legal* question, there is currently no basis which would allow this Court to recognize fetal tissue as such.

Because "substantive due process requires [every law to] be rationally related to a legitimate government interest," *Charleston*, 741 F.3d at 774, and the fetal tissue disposition provisions further no legitimate interest, PPINK has a strong likelihood of success on its substantive due process claim. Accordingly, the Court need not address PPINK's equal protection challenges to these provisions.

B. Irreparable Harm

The second preliminary injunction factor requires PPINK to show "that it is likely to suffer irreparable harm in the absence of preliminary relief" as to each of the provisions it seeks to enjoin. *Grace Schools*, 801 F.3d at 795. Each of the provisions will be addressed in turn.

First, with respect to PPINK's Fourteenth Amendment challenge to the anti-discrimination provisions,

PPINK will clearly suffer irreparable harm if it is unconstitutionally prevented from providing abortions during the pendency of this litigation. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013). At the very least, it is likely that, absent an injunction, PPINK would not be able to provide surgical abortions to some women facing the difficult moral and reproductive health decision of whether to terminate a pregnancy who would otherwise do so during the pendency of this litigation. Second, the harm stemming from PPINK's related First Amendment challenge to the information dissemination provision is also irreparable. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) ("[v]iolations of First Amendment rights are presumed to constitute irreparable injuries.").

Finally, as to PPINK's challenges to the fetal tissue disposition provisions, the Seventh Circuit has recognized that, "for some kinds of constitutional violations, irreparable harm is presumed." *Ezell v. City of Chi*, 651 F.3d 684, 699 (7th Cir. 2011). Several judges in this district, including the undersigned, have concluded that this presumption of irreparable harm also applies to equal protection violations. *See, e.g., Baskin v. Bogan*, 983 F. Supp. 2d 1021, 1028 (S.D. Ind. 2014); *Planned Parenthood of Ind. and Ky. v. Comm'r, Ind. State Dep't of Health*, 984 F. Supp. 2d 912, 930 (S.D. Ind. 2013); *L.P. v. Comm'r, Ind. State Dep't of Health*, 2011 WL 255807, at *4 (S.D. Ind. 2011). Specifically, the undersigned recently held that the reasoning in *Ezell* regarding whether a violation of one's Second Amendment rights creates irreparable harm is equally applicable to violations of one's equal protection rights. *See Exodus Refugee Immigration,*

Inc. v. Pence, Case No. 1:15-cv-01858-TWP-DKL, 2016 WL 772897, at *14 (S.D. Ind. Feb. 29, 2016). This is because, like the First and Second Amendment, violations of equal protection and, here, substantive due process, "'protect[] similarly intangible and unquantifiable interests.'" *Id.* (quoting *Ezell*, 651 F.3d at 699).

The presumption of irreparable harm is applicable here. If PPINK is ultimately successful on its substantive due process challenge to the fetal tissue disposition provisions, the harm stemming from that violation is presumed irreparable. The State appears to recognize this when it acknowledges that "PPINK can establish irreparable harm only to the extent it establishes likely success on its constitutional claims." (Filing No. 54 at 41.)

Accordingly, PPINK has made the necessary showing that it will suffer some measure of irreparable harm in the absence of an injunction as to all the challenged provisions of HEA 1337.

C. Balance of Harms, Public Policy Considerations, and Sliding Scale Analysis

To obtain a preliminary injunction, the moving party must show that its case has some likelihood of success on the merits and that it has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied. *Stuller*, 695 F.3d at 678. For the reasons stated above, PPINK has made these showings with respect to all of its claims. "If the moving party meets these threshold requirements, the district court 'must consider the irreparable harm that the nonmoving party will suffer if preliminary

relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied.'" *Id.* (quoting *Ty*, 237 F.3d at895). "The district court must also consider the public interest in granting or denying an injunction." *Id.*

After addressing these considerations, the Court "weighs the balance of potential harms on a 'sliding scale' against the movant's likelihood of success: the more likely he is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor." *Turnell*, 796 F.3d at 662. The Court will first address the balance of harms and public interest considerations before engaging in the sliding scale analysis of the balance of harms as compared to PPINK's likelihood of success on the merits of each of its claims. Notably, the parties' briefing regarding these factors is very limited.

1. **Anti-Discrimination and Information Dissemination Provisions**

PPINK maintains that it and its patients will suffer significant harm absent an injunction of the anti-discrimination and information dissemination provisions. Specifically, it maintains that the former will prevent numerous women from obtaining an abortion in which they have a constitutional right to obtain, and the latter will cause women to be unconstitutionally and falsely informed that they cannot obtain an abortion for certain reasons. Against these harms, the State maintains that the injunction of a democratically enacted law "'has the cost of diminishing the scope of democratic governance.'" (Filing No. 54 at 42) (quoting *Illinois Bell Tele. Co. v. WorldCom Tech.*,

Inc., 157 F.3d 500, 503 (7th Cir. 1998)). Moreover, the State contends that the anti-discrimination and information dissemination provisions "serve[] the public interest by furthering the State's interests in protecting all human life and preventing discrimination," and to enjoin these laws would prevent the State from accomplishing these goals (Filing No. 54 at 42).

Although the statistical evidence regarding how many women seek an abortion *solely* for one of the enumerated reasons is far from comprehensive or uniform, the parties are essentially in agreement that a significant number of women have sought and will seek an abortion solely because to the diagnosis or potential diagnosis of a disability. (*See, e.g.*, Filing No. 30-1 at 2-3) (attestation from the CEO of PPINK that it has and will continue to provide abortions to women who seek an abortion "solely because of a diagnosis of fetal Down syndrome or other genetic disabilities or the possibility of such a diagnosis"); Filing No. 54 at 14-15 (citing statistics regarding the percentage of fetuses diagnosed with Down syndrome that are aborted)). Absent an injunction of the anti-discrimination provisions, women who seek such an abortion will be unable to obtain one in Indiana. And absent an injunction of the information dissemination provision, abortion providers will be required to inform their patients that they are unable to obtain an abortion solely because of one of the enumerated reasons even though such a restriction is likely unconstitutional.

The harms faced by PPINK and its patients are substantial, irreparable, and significant. Difficult moral and complicated health decisions are made by women whose pregnancies are affected by a prenatal

fetal anomaly. Given the relatively short timeframe in which women may elect to terminate a pregnancy, even a short disruption of a woman's ability to do so could have significant consequences. Given this, the harm flowing from the information dissemination provision is similarly severe. Absent an injunction, women would be informed that there could be legal consequences if they choose to terminate a pregnancy for these particular reasons, which could impair a woman's ability to make her decision with "intimate views" and "with infinite variations." *Casey* at 853. These harms far outweigh the generalized harms faced by the State in the delay of the implementation of its democratically enacted law. *See Van Hollen*, 738 F.3d at 796 ("[i]t is beyond dispute that the plaintiffs face greater harm irreparable by the entry of a final judgment in their favor than the irreparable harm that the state faces if the implementation of its statute is delayed. For if forced to comply with the statute, only later to be vindicated when a final judgment is entered, the plaintiffs will incur in the interim the disruption of the services that the abortion clinics provide.").

Furthermore, the public interest would be served by enjoining these provisions as the vindication of constitutional rights serves the public interest. *See Joelner v. Vill. of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004) ("[s]urely, upholding constitutional rights serves the public interest.") (quoting *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir.2003)); *see also Preston*,589 F.2d at 303 n.3 ("[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm, and

its remedy certainly would serve the public interest."). Although the State is undoubtedly correct that the public interest is served as a general matter by eliminating discrimination in our society, the injunction here seeks to ensure that the State does not do so in a way that very likely violates the Constitution, which is in the public interest.

Having examined all of the relevant factors, the Court must "weigh[] the balance of potential harms on a 'sliding scale' against the movant's likelihood of success: the more likely he is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor." *Turnell*, 796 F.3d at 662. As to the anti-discrimination and information dissemination provisions, the sliding scale analysis is straightforward: PPINK is very likely to succeed on its challenges to these provisions and the balance of harms weigh heavily in its favor. Accordingly, it is clear that PPINK is entitled to a preliminary injunction prohibiting the enforcement of the anti-discrimination and information dissemination provisions pending the resolution of this litigation.

2. Fetal Tissue Disposition Provisions

The Court turns next to the fetal tissue disposition provisions. In arguing that the balance of harms weighs in its favor, PPINK primarily relies on the presumed harm that flows from a substantive due process violation discussed above. The State, for its part, focuses on the same harm discussed above regarding the cost of enjoining democratically enacted laws, as well how an injunction will prevent the State from

providing enhanced dignity to fetal tissue that the State believes is warranted. Lastly, the parties dispute how the Court should weigh the financial harm the fetal tissue disposition provisions will cause PPINK.

The Court views the parties' generalized harms as essentially equal. PPINK is correct that there is a certain level of irreparable harm that flows from every constitutional violation, yet the State is correct that it has a legitimate interest in enforcing democratically enacted laws. As to the financial impact these provisions will have on PPINK, the evidence reveals that they will increase the annual cost of disposing fetal tissue from its current level. (Filing No. 57-2 at 3-4). Although not an overwhelming sum, it will undoubtedly have a financial impact on PPINK and possibly its patients. Given this, the balance of harms weighs slightly in PPINK's favor.[6] Moreover, as to the public interest considerations, for the same reasons discussed above, these considerations do not preclude an injunction given that the fetal tissue disposition provisions are likely unconstitutional. *See Joelner*, 378 F.3d at 620.

With the foregoing analysis in mind, the Court must again "weigh[] the balance of potential harms on a 'sliding scale' against the movant's likelihood of success: the more likely he is to win, the less the balance of harms must weigh in his favor; the less likely he is

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[6] Given the Court's ultimate weighing of the factors, the Court need not resolve whether the financial harm to PPINK is irreparable. (See Filing No. 57 at 17 (arguing that the financial harm is irreparable because the State is "protected from damages liability by the Eleventh Amendment")). Even if it is not, PPINK would be entitled to a preliminary injunction.

to win, the more it must weigh in his favor." *Turnell*, 796 F.3d at 662. The sliding scale analysis is more difficult with respect to the fetal tissue disposition provisions than it is regarding the other two challenged provisions. Critical to the Court's analysis is the Seventh Circuit's reminder that "[t]he sliding scale approach is not mathematical in nature, rather it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief." *Stuller*, 695 F.3d at 678 (citation and internal quotation marks omitted). "Stated another way, the district court 'sit[s] as would a chancellor in equity' and weighs all the factors, 'seeking at all times to minimize the costs of being mistaken.'" *Id.* (quoting *Abbott Labs.*, 971 F.2d at 12).

That said, PPINK is likely to succeed on its substantive due process challenge to the fetal tissue disposition provisions and the balance of harms weighs, albeit slightly, in its favor. Given PPINK's likelihood of success, it does not need the balance of harms to weigh in its favor in order to be entitled to an injunction. But it does. Accordingly, it is clear that PPINK is entitled to a preliminary injunction prohibiting the enforcement of the fetal tissue disposition provisions pending the resolution of this litigation.

In sum, the Court has "weigh[ed] all the factors" and sought "at all times to minimize the costs of being mistaken.'" *Stuller*, 695 F.3d at 678. It has done so in light of the Supreme Court's warning that "injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is en-

titled to such relief." *Winter*, 555 U.S. at 376. Nevertheless, PPINK has demonstrated that it is entitled to the injunction it seeks.

IV. CONCLUSION

The United States Supreme Court has stated in categorical terms that a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability. It is clear and undisputed that until *Roe v. Wade* and *Planned Parenthood of Se. Pa. v. Casey* are overturned by the United States Supreme Court, this Court is bound to follow that precedent under the rule of *stare decisis*. *See Casey*, 505 U.S. at 870, 112 S.Ct. 2791 (stating that the doctrine of *stare decisis* requires reaffirmance of *Roe's* essential holding recognizing a woman's right to choose an abortion before fetal viability); *MKB Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900 (D. N.D . 2013) ("[n]o judge in the United States can overrule *Roe v. Wade*; only the Supreme Court can do so"); *Sojourner v. Roemer*, 772 F. Supp. 930, 932 (E.D. La. 1991).

PPINK has clearly demonstrated that the anti-discrimination provisions and the information dissemination provision should be enjoined pending resolution of this litigation. It is likely to succeed on the merits of its challenges to these provisions as the anti-discrimination provisions directly contravene well-established law that precludes a state from prohibiting a woman from electing to have an abortion prior to fetal viability. Similarly, the information dissemination provision is likely unconstitutional as it requires

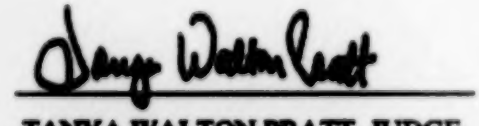
abortion providers to convey false information regarding the anti-discrimination provisions to their patients. PPINK faces irreparable harm of a significantly greater magnitude if these provisions are not enjoined than that faced by the State.

Second, PPINK has persuasively shown that the fetal tissue disposition provisions do not further a legitimate state interest and thus are likely unconstitutional. This, when combined with the fact that the balance of harms weighs slightly in PPINK's favor, leads to the conclusion that PPINK is also entitled to an injunction with respect to these provisions.

Accordingly, PPINK's Motion for Preliminary Injunction is **GRANTED**. (Filing No. 7.) Pursuant to Federal Rule of Civil Procedure 65(d), the Court **ISSUES A PRELIMINARY INJUNCTION** prohibiting the State from enforcing the following provisions of HEA 1337: the anti-discrimination provisions, Indiana Code §§ 16-34-4-4, 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8, the information dissemination provision, Indiana Code § 16-34-2-1.1(a)(1)(K), and the fetal tissue disposition provisions. Because the State has not disputed PPINK's position that the State will not incur monetary damages from an injunction, PPINK need not post a bond.

SO ORDERED.

Date: 6/30/2016



TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 25, 2018

By the Court[*]:

No. 17-3163

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Plaintiffs-Appellees,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:16-cv-00763-TWP-DML

Tanya Walton Pratt, *Judge.*

ORDER

Defendants-appellants have requested en banc review in this case limited only to the question of the constitutionality of Ind. Code § 16-34-3- 4, which regulates the disposal of fetal remains after an abortion or miscarriage. On June 8, 2018, the court granted the

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[*] Judge Scudder took no part in the consideration or decision of this matter.

petition and vacated Part II.B of the panel's opinion of April 19, 2018, *Planned Parenthood of Ind. and Ky., Inc. v. Comm'r of Ind. State Dept. of Health*, 888 F.3d 300, 307–10 (7th Cir. 2018). However, information coming to the attention of a member of the court caused that judge to conclude that recusal was necessary and that the judge had been ineligible to vote on the petition for rehearing en banc. Taking into account that judge's recusal, the vote of the circuit judges in regular active service was evenly divided, and thus the necessary majority required by 28 U.S.C. § 46(c) for rehearing en banc was, and is, not present. Judges Easterbrook, Kanne, Sykes, Barrett, and Brennan voted to grant rehearing en banc. We therefore **VACATE** the order of June 8, 2018, and reinstate the panel's opinion.

WOOD, *Chief Judge*, with whom *Circuit Judges* ROVNER and HAMILTON join, concurring. Not every case in a highly controversial area deserves to be reheard by the *en banc* court. Just as the Supreme Court passes by many potentially interesting and important cases when it exercises its *certiorari* jurisdiction, particularly when either the facts or the law may stand in the way of a clean decision on the merits of the issue that concerns the Court, we must exercise the same restraint. Unless it is possible to identify a properly presented, important issue of law that lies within the power of this court to resolve, we should refrain from rolling out the big guns of the full court. Otherwise we risk issuing what would be at best an opinion correcting an error made by a panel, and at worst an advisory letter to the Supreme Court. The present case is not one that meets those criteria. Idiosyncratic procedural hurdles would block our ability

to conduct a thorough review of the only issue the state of Indiana has asked us to rehear—the constitutionality of the fetal disposal provisions of House Enrolled Act No. 1337, Ind. Code §§ 16-34-3- 4(a), 16-41-16-4(d), 16-41-16-5, and 16-41-16.7.6.

The state has not asked for rehearing *en banc* of the panel's ruling on the Sex Selective and Disability Abortion Ban, Ind. Code § 16-34-4, and the reason why is obvious: only the U.S. Supreme Court has the power to decide whether to change the rule of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which holds unequivocally that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("it is this Court's prerogative alone to overrule one of its precedents"). The state's decision in this respect amounts to a waiver of its right to have this court reconsider that part of the panel's decision. In light of that waiver, I do not address that part of the case. The Supreme Court does not need essays from different federal judges to assist its own thinking. Should the state seek further review, I am confident that the parties will brief the issue ably, and that numerous *amicus curiae* contributions will also be filed. My focus instead is on the issue that was presented to us: the fetal disposal rules.

Planned Parenthood conceded that the disposal regulation does not implicate a fundamental right, and it then moved directly to the conclusion that the proper level of inquiry was rational-basis review. The panel properly decided the case in light of that strategic litigation choice. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888

F.3d 300, 307–08 (7th Cir. 2018). In doing so, the panel ably applied that level of scrutiny. I have little to add to its analysis except to wonder how, if respect for the humanity of fetal remains after a miscarriage or abortion is the state's goal, this statute rationally achieves that goal when it simultaneously allows any form of disposal whatsoever if the mother elects to handle the remains herself. It is not hard to hypothesize disposal methods that would be far less respectful than those presently used for biological materials in clinics.

The problem, however, is that the parties' concession with respect to the standard of review—a choice that is capable of dictating the outcome—was probably incorrect. Without that concession, the court's review would have taken a different turn. This case involves a fundamental right: the woman's right to decide whether to carry a child (or, put negatively, whether to have an abortion). *See Roe v. Wade*, 410 U.S. 113 (1973). In my view, statutes such as Indiana's cannot properly be examined if the question of the standard of review is off the table, as it was for our panel.

In many cases, that choice will be outcome determinative. A look at the relevant Supreme Court decisions strongly suggests that rational-basis is not the proper level of scrutiny. The disposal of an aborted (or miscarried) fetus is just the final step in the overall process of terminating (or losing) a pregnancy. It thus implicates an interest with heightened constitutional protection: "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." *Casey*, 505 U.S. at 846. Therefore, the question for this court should

have been whether the law "has the effect of placing a substantial obstacle in the path of a woman's choice." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quoting *Casey*, 505 U.S. at 877). To move forward with this case as if rational-basis were the proper standard would force us to decide an important issue with blinders on. The court would need to ignore the Supreme Court's admonition not to "equate the judicial review applicable to the regulation of a constitutionally protected personal liberty interest with the less strict review applicable where, for example, economic legislation is at issue." *Whole Woman's Health*, 136 S. Ct. at 2309. The fact that fetal-disposal regulations potentially affect the constitutional right to obtain a pre-viability abortion distinguishes this law from the countless cases that do not implicate a constitutional right—say, animal-welfare statutes. There are plenty of rationally enacted laws that do not burden any constitutional rights.

It does not matter for the constitutional concerns presented in this case that the disposal statute operates at the end of the procedure. Hypotheticals should make that point clear. A post-procedure spousal notification law, perhaps enforced by a criminal penalty, is no less a substantial obstacle than a pre-procedure notification requirement. And I expect that any woman would experience an undue burden on her right to have a pre-viability abortion if state law required her to check herself into a mental hospital for a week after the procedure was complete. In keeping with these principles, other courts have applied not the rational-basis standard, but the undue-burden standard, when considering the lawfulness of fetal remains regulations. See *June Med. Servs. LLC v. Gee*,

280 F. Supp. 3d 849 (M.D. La. 2017); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1098 (E.D. Ark. 2017), appeal filed, No. 17-2879 (8th Cir. Aug. 28, 2017); *Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 227–29 (W.D. Tex. 2017).

The forced limitation of this case to the rational-basis standard would distort any *en banc* consideration we could give. It is entirely possible that a state law would pass rational-basis, one-step-at-a-time, review, but would nonetheless impose an undue burden on a women's choice to have an abortion. The examples reviewed in *Casey* are good illustrations. That possibility suggests that leaving the panel's decision intact is unlikely to spell the end of fetal disposal litigation even in this circuit. Every nuance in this area is litigated over and over. Nor does our denying the motion for rehearing bring to an end litigation already progressing across the country. See, *e.g.*, *Hopkins v. Jegley*, No. 17-2879 (8th Cir. appeal docketed Aug. 28, 2017); *June Med. Servs. LLC v. Gee*, No. 3:16-cv-00444-BAJ-RLB (M.D. La. docketed July 1, 2016); *Whole Woman's Health v. Smith*, No. 1:16-cv-01300-DAE-AWA (W.D. Tex. docketed Dec. 12, 2016). If the Supreme Court wants to take some aspect of this issue, it will have ample opportunity to do so.

Moreover, further review of this case would necessarily proceed without the benefit of a record developed with the proper legal standard in mind. Given the posture in which this case comes before us, it is unremarkable that, as Judge Easterbrook observes, plaintiffs have not contended or shown that the fetal disposal statute is a substantial obstacle. Easterbrook, J., dissenting, *post* at slip op. 7. Litigating on a

"rational-basis" standard makes such evidence unnecessary; under the proper standard of review, however, evidence does make a difference, and it should be developed before the court charges headlong into such an important issue. And that is not the only evidence currently missing as a result of a misapprehension of the standard of review. For example, the evidence is thin to nonexistent on the costs imposed by the disposal regulations—costs that include not only a higher out-of-pocket dollar price for the procedure, but that might include psychological trauma that chills women from seeking abortions or medical care in relation to miscarriages because of the potential stigmatizing impact of these measures. Nor did the plaintiffs have reason to explore how the disposal statute might work in tandem with other regulations in a way that unduly burdens the right to choose, as is required under *Whole Women's Health*. 136 S. Ct. at 2309, 2313. The record simply did not explore what should have been the central issues and what are likely to be the primary points of contention in the next case to come along.

It would be a waste of this court's resources to accept a case for *en banc* review if the only thing we could say is that the parties' decision to use rational-basis review is binding on us, but that everything might be different if the standard from *Casey* and *Whole Women's Health* were applied and a proper record in light of that standard had been developed. It would not quite be a hypothetical case, but it would be too close for comfort. Important as these issues are, the only prudent course to take is to forgo *en banc* review this time and await a case that more cleanly presents all relevant issues.

I therefore concur in the decision to deny rehearing *en banc*.

EASTERBROOK, *Circuit Judge*, with whom *Circuit Judges* SYKES, BARRETT, and BRENNAN join, dissenting from the denial of rehearing en banc. This case concerns two statutes. The first, which I call the eugenics statute, makes it illegal to perform an abortion for the purpose of choosing the sex, race, or (dis)abilities of a child. Ind. Code §§ 16-34-4-1 to 16-34-4-9. The second, which I call the disposal statute, requires fetal remains to be cremated or buried; they cannot be placed in medical trash, although the remains of multiple fetuses may be incinerated together. Ind. Code. §§ 16-34-3-4(a), 16-41-16-4(d), 16-41-16-5, 16-41-16-7.6.

The panel held the eugenics statute unconstitutional because the lead opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992) (O'Connor, Kennedy & Souter, JJ.), says that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." The panel held the disposal statute unconstitutional because fetal remains are not remains of "persons" within the scope of the Due Process Clause, see *Roe v. Wade*, 410 U.S. 113, 158–59 (1973), making it irrational to require them to be treated as if they were. See 888 F.3d 300, 305–07 (eugenics statute), 307–10 (disposal statute) (7th Cir. 2018).

I am skeptical about the first of these conclusions because *Casey* did not consider the validity of an anti-eugenics law. Judicial opinions are not statutes; they resolve only the situations presented for decision.

Consider a parallel in private law. Judges often said that employers could fire workers for any or no reason. That's the doctrine of employment at will. But by the late twentieth century courts regularly created exceptions when the discharge was based on race, sex, or disability. *Casey* does not tell us whether a parallel "except" clause is permissible for abortions.

Casey and other decisions hold that, until a fetus is viable, a woman is entitled to decide whether to bear a child. But there is a difference between "I don't want a child" and "I want a child, but only a male" or "I want only children whose genes predict success in life." Using abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered.

None of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children. It is becoming possible to control some aspects of embryos' genomes. See Clyde Haberman, *Scientists Can Design 'Better' Babies. Should They?*, NEW YORK TIMES, June 10, 2018. States may regulate that process when conception is by *in vitro* fertilization. Does the Constitution supply a right to evade regulation by choosing a child's genetic makeup after conception, aborting any fetus whose genes show a likelihood that the child will be short, or nearsighted, or intellectually average, or lack perfect pitch—or be the "wrong" sex or race? *Casey* did not address that question. We ought not impute to the Justices decisions they have not made about problems they have not faced.

Still, Indiana has not asked us to rehear this part of the panel's decision. Only the Supreme Court can

determine the answer; we might guess, but the Justices can speak authoritatively. So although 18 states have filed an *amicus* brief asking us to rehear this part of the decision en banc, I am content to leave it to the Supreme Court.

The panel's holding on the disposal statute is another matter, because "X is not a person" does not imply "X is beyond regulatory authority." Think of animal-welfare statutes. Dogs may not be beaten for fun. Bullfights are forbidden. Horses may not be slaughtered in Illinois for the dinner table under a statute this circuit sustained largely on animal-welfare grounds. See *Cavel International, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007). Accord, *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326 (5th Cir. 2007). Many states have laws that prescribe how animals' remains must be handled. See, e.g., Ala. Code §3-1-28; Ga. Code §4-5-5; Iowa Code §167.18(1); Kan. Stat. §47-1219; Mich. Comp. Laws §287.671(2); Mo. Stat. §269.020; 3 Pa. Stat. §2352(a)(4); Utah Code §4-31-102(1); Wis. Stat. §95.50; Wyo. Stat. §35-10-104. The panel has held invalid a statute that would be sustained had it concerned the remains of cats or gerbils.

Animal-welfare statutes are rational not simply because all mammals can feel pain and may well have emotions, but also because animal welfare affects human welfare. Many people feel disgust, humiliation, or shame when animals or their remains are poorly treated. We wrote in *Cavel* that a ban on slaughtering horses for human consumption is rationally related to the goal of reducing dismay at poor treatment of these creatures. 500 F.3d at 557. Isn't that equally true of a statute about fetal remains?

In giving a negative answer, the panel created a conflict with *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). The Eighth Circuit sustained a statute equivalent to Indiana's. The majority distinguished *Minnesota* on the ground that Planned Parenthood of Minnesota conceded that the state has a legitimate interest in protecting public sensibilities, while Planned Parenthood of Indiana and Kentucky denies that. 888 F.3d at 309. This shows a difference in litigation strategies, but to deny that public sensibilities can matter (as the panel did) creates a conflict with decisions in many circuits, on subjects ranging from animal welfare to aesthetic zoning to obscenity. Many a state law promotes public morals in a way that John Stuart Mill would disapprove, but he was not among the drafters of the Fourteenth Amendment. (The overlap between Mill's *On Liberty* and Mr. Herbert Spencer's *Social Statics* is considerable, but Justice Holmes's dissent in *Lochner v. New York*, 198 U.S. 45, 75–76 (1905), has prevailed and *Social Statics* is not part of the Constitution. Neither is *On Liberty*.)

The panel went on to observe that Indiana is concerned about the interest of the fetus, while Minnesota isn't. This implies that the same statute could be passed again in Indiana, and held valid, as long as the legislative history is different. Yet the intent behind a law does not affect rational-basis analysis. A law is valid if a rational basis can be imagined, no matter what legislators thought or said. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313–17 (1993). The panel also observed that the disposal statute does not prevent a woman from taking possession of the fetal remains and disposing of them as she

pleases, 888 F.3d at 309, which is true but irrelevant. A state need not regulate comprehensively in order to regulate at all. See, e.g., *Bowen v. Owens*, 476 U.S. 340, 347 (1986). It may take one step at a time.

Plaintiffs have not argued that the disposal statute places a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878 (lead opinion), quoted and applied in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016). The disposal statute operates after the abortion is complete. The costs of satisfying the statute may be rolled into the procedure's price and so in principle could affect a woman's decision to have an abortion. But plaintiffs do not contend, and the record does not show, that the costs are substantial. (They estimate an incremental cost of $6 to $12 but do not explain how the figure was derived.) I could not find data suggesting that the price of an abortion in Minnesota rose at all after it adopted a disposal statute, that abortion services there have become harder to procure, or that the number of abortions has been affected. Rational-basis analysis therefore is the appropriate approach, and our panel did not follow the Supreme Court's rules for rational-basis inquiry. There is no need to leave this matter to the Justices; rehearing en banc is preferable to a constitutional decision preventing Indiana from implementing a law materially the same as one that has been held valid, and operates daily, elsewhere in the nation.

Chief Judge Wood observes that plaintiffs' litigation choices, including their decision to produce "thin to nonexistent" (slip op. 4) evidence about the effects of the disposal statute, prevent us from deciding

whether this law puts a "substantial obstacle" in a woman's path. She invites future litigants to supply more evidence and make different legal arguments. But if more than 25 years' experience in Minnesota does not furnish evidence of a substantial obstacle, where would it come from? And why would any other litigant choose a different strategy? Now that the disposal statute has been held to lack a rational basis, there will be no more litigation in this circuit, no opportunity for the full court to consider other lines of argument. Kicking the can down the road is not an attractive option, for we have reached the road's end.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 8, 2018

By the Court:

No. 17-3163

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Plaintiffs-Appellees,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:16-cv-00763-TWP-DML

Tanya Walton Pratt, *Judge.*

ORDER

Defendants-appellants have requested en banc review in this case limited to the question of the constitutionality of Ind. Code § 16-34-3-4, which regulates the disposal of fetal remains after an abortion or miscarriage. A majority of the judges in active service have voted to grant the state's petition. Accordingly, the petition for rehearing en banc is **GRANTED**. Part II.B of the panel's opinion of April 19, 2018, *Planned Parenthood of Ind. and Ky., Inc. v. Comm'r of the Ind.*

State Dept. of Health, 888 F.3d 300, 307–10 (7th Cir. 2018), is **VACATED**, and the judgment is also **VACATED** insofar as it affirmed the district court's decision to enjoin enforcement of the fetal disposition statute. The court will set a date for the en banc oral argument by separate order.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

June 25, 2018

Before: WILLIAM J. BAUER, Circuit Judge
JOEL M. FLAUM, Circuit Judge
DANIEL A. MANION, Circuit Judge

No. 17-3163	PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., et al., Plaintiffs - Appellees v. COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, et al., **Defendants - Appellants**

District Court No: 1:16-cv-00763-TWP-DML
Southern District of Indiana, Indianapolis Division
District Judge Tanya Walton Pratt

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on April 19, 2018, as reinstated on June 25, 2018.

Indiana Code 16-34-4

Sec. 1. (a) As used in this chapter, "any other disability" means any disease, defect, or dis-order that is genetically inherited. The term includes the following:

(1) A physical disability.

(2) A mental or intellectual disability.

(3) A physical disfigurement.

(4) Scoliosis.

(5) Dwarfism.

(6) Down syndrome.

(7) Albinism.

(8) Amelia.

(9) A physical or mental disease.

(b) The term does not include a lethal fetal anomaly.

Sec. 2. As used in this chapter, "Down syndrome" means a chromosomal disorder associated with an extra chromosome 21 or an effective trisomy for chromosome 21.

Sec. 3. As used in this chapter, "potential diagnosis" refers to the presence of some risk factors that indicate that a health problem may occur.

Sec. 4. As used in this chapter, "sex selective abortion" means an abortion that is per-formed solely because of the sex of the fetus.

Sec. 5. (a) A person may not intentionally per-form or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the per-son knows that the pregnant woman is seeking a sex selective abortion.

(b) A person may not intentionally perform or attempt to perform an abortion after viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking a sex selective abortion.

(c) This section is severable as specified in IC 1-1-1-8.

Sec. 6. (a) A person may not intentionally per-form or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the per-son knows that the pregnant woman is seeking the abortion solely because the fetus has been diagnosed with Down syndrome or has a potential diagnosis of Down syndrome.

(b) A person may not intentionally perform or attempt to perform an abortion after viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking the abortion solely because the fetus has been diagnosed with Down syndrome or has a potential diagnosis of Down syndrome.

(c) This section is severable as specified in IC 1-1-1-8.

Sec. 7. (a) A person may not intentionally per-form or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the per-son knows that the pregnant woman is seeking the abortion solely because the fetus has been diagnosed with any other disability or has a potential diagnosis of any other disability.

(b) A person may not intentionally perform or attempt to perform an abortion after viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking the abortion solely because the fetus has been diagnosed with any other disability or has a potential diagnosis of any other disability.

(c) This section is severable as specified in IC 1-1-1-8.

Sec. 8. (a) A person may not intentionally per-form or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the per-son knows that the pregnant woman is seeking the abortion solely because of the race, color, national origin, or ancestry of the fetus.

(b) A person may not intentionally perform or attempt to perform an abortion after viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking the abortion solely because of the race, color, national origin, or ancestry of the fetus.

(c) This section is severable as specified in IC 1-1-1-8.

Sec. 9. (a) A person who knowingly or intentionally performs an abortion in violation of this chapter may be subject to:

(1) disciplinary sanctions under IC 25-1-9; and

(2) civil liability for wrongful death.

(b) A pregnant woman upon whom an abor-tion is performed in violation of this chapter may not be prosecuted for violating or conspiring to violate this chapter.

Indiana Code 16-34-2-1.1(a)(1)(K)

(1) At least eighteen (18) hours before the abortion and in the private, not group, presence of the pregnant woman, the physician who is to perform the abortion, the referring physician or a physician assistant (as defined in IC 25-27.5-2-10), an advanced practice registered nurse (as defined in IC 25-23-1-1(b)), or a certified nurse midwife (as defined in IC 34-18-2-6.5) to whom the responsibility has been delegated by the physician who is to perform the abortion or the referring physician has informed the pregnant woman orally and in writing of the following:

. . .

(K) That Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability.

Indiana Code 16-34-3-4

Sec. 4. (a) An abortion clinic or health care facility having possession of an aborted fetus shall provide for the final disposition of the aborted fetus. The burial transit permit requirements of IC 16-37-3 apply to the final disposition of an aborted fetus, which must be interred or cremated. However:

(1) a person is not required to designate a name for the aborted fetus on the burial transit permit and the space for a name may remain blank; and

(2) any information submitted under this section that may be used to identify the pregnant woman is confidential and must be redacted from any public records maintained under IC 16-37-3.

Aborted fetuses may be cremated by simultaneous cremation.

(b) The local health officer shall issue a permit for the disposition of the aborted fetus to the person in charge of interment for the interment of the aborted fetus. A certificate of stillbirth is not required to be issued for an aborted fetus with a gestational age of less than twenty (20) weeks of age.

(c) IC 23-14-31-26, IC 23-14-55-2, IC 25-15-9-18, and IC 29-2-19-17 concerning the authorization of disposition of human remains apply to this section.

No. 18-483

In The Supreme Court of the United States

KRISTINA BOX, COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Indiana's House Enrolled Act 1337 ("Enrolled Act" or "the challenged statute") requires that, after an abortion or miscarriage occurring at a medical facility, health care providers must dispose of the embryonic or fetal tissue by cremation or interment. Ind. Code §§ 16-21-11-6 (miscarriages), 16-34-3-4 (abortions). But if the patient elects to take custody of the tissue, she can dispose of it in any manner she chooses. Another provision prohibits a woman from obtaining a pre-viability abortion if her decision to terminate her pregnancy is based on one of a number of proscribed grounds, including concerns that the fetus has a diagnosis or "potential diagnosis" of Down syndrome or "any other disability." Ind. Code § 16-34-4-1, *et seq.* The questions presented are:

1. Whether the court of appeals' holding that Indiana's requirements for the disposal of embryonic and fetal tissue fails rational basis review under the Due Process Clause warrants this Court's review, where there is no meaningful circuit conflict, where a decision by this Court would provide no guidance to the lower courts currently considering more expansive challenges to similar statutes, and where the court of appeals properly applied well-established legal principles in concluding that Indiana's statutory scheme does not rationally further its asserted interest.

QUESTIONS PRESENTED – Continued

2. Whether the court of appeals' decision striking down a prohibition on a woman obtaining a pre-viability abortion where Indiana disapproves of her reason for doing so warrants review by this Court, where there is no conflict or even any other decision on the issue among courts of appeals and where the court below applied settled precedent from this Court that bars states from prohibiting women from terminating a pregnancy before viability.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners are Dr. Kristina Box, the Commissioner of the Indiana State Department of Health; the Prosecutors of Marion, Lake, Monroe, and Tippecanoe Counties; and the Individual Members of the Medical Licensing Board of Indiana. The respondents are Planned Parenthood of Indiana and Kentucky, Inc., and Dr. Carol Dellinger, M.D.

Planned Parenthood of Indiana and Kentucky, Inc., is a nonprofit domestic corporation. It is not publicly held and has no parent corporation.

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STATEMENT OF THE CASE

Planned Parenthood of Indiana and Kentucky, Inc. ("PPINK") provides reproductive health services and education to thousands of men, women, and teens each year in Indiana and in Kentucky. At three of its many Indiana health centers, PPINK provides surgical abortions during the first trimester of pregnancy, until fourteen weeks after the first day of a woman's last menstrual period. At these health centers and one other, PPINK also provides medication abortions to women who are no more than ten weeks pregnant. In a medication abortion, the woman takes one medication at the health center and a second medication twenty-four to forty-eight hours later at a location of her choosing, so that the abortion is completed outside of the health center. In addition, if upon examination PPINK determines that a woman has miscarried, it will complete the miscarriage, either using medications alone, or surgically in a manner that is identical to a medication or surgical abortion.[1]

Women who seek abortions do so for a variety of medical, psychological, emotional, familial, economic, and other personal reasons. Almost 60% of women nationwide who have abortions are already

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[1] PPINK does not provide abortions beyond the first trimester. Indiana law limits the provision of second trimester abortion to hospitals or ambulatory surgical centers and generally bans abortion entirely after twenty weeks of post-fertilization age. Ind. Code § 16-34-2-1.

mothers.[2] Women faced with a diagnosis of a fetal anomaly do carefully consider whether to carry a potentially disabled child to term. Br. of Amici Curiae, Disability Advocates in Support of Plaintiffs-Appellees and Affirmance, 7th Cir. Case No. 17-3163, Doc. 34 at 7-8 (filed Jan. 3, 2018). Allowing women and their families the freedom to make that decision for themselves is the best way to ensure that the mother and her family will be able to create and maintain an environment in which a disabled child is likely to thrive. *See id.* at 4.

Indiana law generally gives the woman having an abortion "the right to determine the final disposition of" the embryonic or fetal tissue that is removed in a first trimester surgical abortion or surgical completion of a miscarriage. Ind. Code § 16-34-3-2(a). Prior to the Enrolled Act, if the woman decided to let a health care provider such as PPINK dispose of the tissue, Indiana law required that it be disposed of in specified sanitary ways, just as with all other tissue retained by medical facilities following surgeries. Ind. Code §§ 16-41-16-3, 16-41-16-4(b) (amended eff. July 1, 2016), 16-41-16-5 (amended eff. July 1, 2016). Under this scheme, PPINK transferred the material to a medical waste removal company that incinerated and disposed of the tissue in accordance with law.

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[2] Jenna Jerman, et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, New York: Guttmacher Institute, 2016, at https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014 (last visited Nov. 28, 2018).

In 2016, Indiana enacted House Enrolled Act 1337. Three provisions are at issue in this case.

a. The first challenged provision alters the way medical facilities must dispose of embryonic and fetal tissue, requiring that it be interred or cremated. Ind. Code §§ 16-21-11-6 (miscarriages), 16-34-3-4 (abortions). Notably, however, the new law does not apply if a woman who has had an abortion or miscarriage elects to take control of the tissue from the medical facility; she is allowed to dispose of the tissue in any way she wishes. Ind. Code §§ 16-21-11-6(a) (miscarriages), 16-34-3-2 (abortions). And although Indiana has sought to justify the new law as providing "the same dignity" to fetuses as to deceased persons (Pet. 5), the new law also permits medical facilities to cremate or inter embryonic and fetal tissue from multiple pregnancies together, a procedure that is not generally permissible for deceased persons. Ind. Code §§ 16-34-3-4, 23-14-31-39.

b. The second provision prohibits a woman from having a pre-viability abortion if she is doing so for certain reasons of which Indiana disapproves. In particular, the statute makes it a crime for a doctor to perform an abortion if the woman is seeking the abortion solely because of the race, color, national origin, ancestry, or sex of the fetus, or because the fetus has been diagnosed with Down syndrome or "any other disability" or has "a potential diagnosis" of Down syndrome or "any other disability." Ind. Code § 16-34-4-1, *et seq.*

The term "any other disability" is defined expansively as "any disease, defect or disorder that is genetically inherited." Ind. Code § 16-34-4-1(a). The only exception is if the disability will, with reasonable medical certainty, result in death within three months of birth. Ind. Code §§ 16-34-4-1(b), 35-46-5-3(a). Thus, this provision categorically bans a woman from obtaining an abortion on the basis of a diagnosis that the child would be born with a genetic disorder that is likely to cause death in early childhood but not within the first three months, including, for example, Tay-Sachs disease, Edward syndrome (Trisomy 18), Krabbe disease, or Niemann-Pick type A.[3]

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[3] "Tay-Sachs disease is a rare inherited disorder that progressively destroys nerve cells (neurons) in the brain and spinal cord. The most common form of Tay-Sachs disease becomes apparent in infancy. Infants with this disorder typically appear normal until the age of 3 to 6 months, when their development slows and muscles used for movement weaken. . . . Children with this severe infantile form of Tay-Sachs disease usually live only into early childhood." NIH—U.S. National Library of Medicine, Genetics Home Reference—Your Guide to Understanding Genetic Conditions, *Tay-Sachs disease; Description*, at https://ghr.nlm.nih.gov/condition/tay-sachs-disease#resources (last visited Oct. 23, 2018).

Trisomy 18 is a condition caused by a chromosomal abnormality that may be inherited or may be the result of a random event during cell division. U.S. National Library of Medicine, *Trisomy 18—Causes*, at https://ghr.nlm.nih.gov/condition/trisomy-18#genes (last visited Nov. 2, 2018). Although many individuals with Trisomy 18 will die within the first month of birth, 5-10% will live past their first years, but will often have severe intellectual disabilities. U.S. National Library of Medicine, *Trisomy 18—Description*, at https://ghr.nlm.nih.gov/condition/trisomy-18#genes (last visited Nov. 2, 2018).

The statute's prohibition on abortions triggered by a "potential diagnosis" of a disability applies if the woman acts because of "the presence of some risk factors that indicate a health problem may occur." Ind. Code § 16-34-4-3. The law does not require that a medical professional determine that there is such a risk factor. It is enough that a woman is aware that the fetus has the potential for a genetically inherited disease or disorder and is seeking an abortion for that reason. For example, a woman who wanted an abortion because she has a serious disease that significantly affects life expectancy that can be inherited, such as cystic fibrosis, would be required by law to continue her pregnancy. Similarly, a woman over the age of thirty-five who decides to have an abortion because of the higher statistical risk of a disability from a chromosomal anomaly associated with advanced maternal age would be prohibited from having one.[4]

Krabbe disease is an incurable inherited disorder "that destroys the protective coating (myelin) of nerve cells in the brain and throughout the nervous system" and is generally fatal by the age of two. Mayo Clinic, *Krabbe disease*, at https://www.mayoclinic.org/diseases-conditions/krabbe-disease/symptoms-causes/syc-20374178 (last visited Nov. 2, 2018).

Niemann-Pick type A is an inherited disease caused by mutations in genes that metabolize fat and causes severe and progressive brain disease that is generally fatal within a few years of birth. Mayo Clinic, *Niemann-Pick*, at https://www.mayoclinic.org/diseases-conditions/niemann-pick/symptoms-causes/syc-20355887 (last visited Nov. 2, 2018).

[4] *See, e.g.*, ACOG (The American College of Obstetricians and Gynecologists), *Having a Baby After Age 35: How Aging Affects Fertility and Pregnancy – Frequently Asked Questions*, at https://www.acog.org/Patients/FAQs/Having-a-Baby-After-Age-35-How-

c. The third challenged provision requires that abortion providers inform women seeking abortion services that Indiana law prohibits them from obtaining an abortion on the above bases. Ind. Code § 16-34-2-1.1(a)(1)(K). PPINK objected to providing this information and objected to its patients having to receive this information. App. 95a. Indiana has conceded that, if the ban is invalid, so too is the requirement that women be informed of the ban. App. 14a.

PPINK filed suit prior to the effective date of the statute. After first issuing a preliminary injunction against the three challenged provisions, the district court ultimately granted summary judgment to PPINK and entered a permanent injunction. App. 74a, 113a. The district court concluded that the prohibition on pre-viability abortions for the disapproved reasons violated a woman's right to choose to have an abortion prior to viability; by banning certain pre-viability abortions, the court concluded, the law seeks to accomplish "precisely what the Supreme Court has held is impermissible." App. 61a. Because it concluded that the abortion ban was unconstitutional, the district court also enjoined the statute's requirement that women be informed of the ban. App. 66a-67a. The district court found that the provisions regarding disposition of embryonic and fetal tissue violated due process by imposing obligations on respondents that were not rationally related to a legitimate state interest. App. 69a-73a. PPINK did not argue that this provision of the statute

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Aging-Affects-Fertility-and-Pregnancy#does (last visited Oct. 26, 2018).

unduly burdened a woman's fundamental right to abortion, and therefore maintained that only rational basis review should be applied to the statute.

On appeal, a unanimous panel of the Seventh Circuit concluded that the ban on pre-viability abortions violated the privacy rights recognized in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality), and their progeny. App. 8a-14a. As the court found, "[t]he Supreme Court has been clear: the State may inform a woman's decision before viability, but it cannot prohibit it." App. 14a. In addition, the court reasoned that it is "entirely inconsistent to hold that a woman's right of privacy to terminate a pregnancy exists if a woman decides before she becomes pregnant that she does not want to bear a child, but that the State can eliminate this privacy right if a woman later decides she wants to terminate her pregnancy for a particular purpose." App. 12a. The court explained that "[n]othing in the Fourteenth Amendment or Supreme Court precedent allows the State to invade this privacy realm to examine the underlying basis for a woman's decision to terminate her pregnancy." App. 13a.

By a 2-1 vote, with Judge Manion dissenting, the court also declared unconstitutional the tissue disposition provision. Indiana maintained that this provision served its interest in "the humane and dignified disposal of human remains," predicated on its determination "*that a fetus is a human being*." App. 15a (quoting Indiana brief) (emphasis added by court). The court

rejected this interest, noting that this Court has refused to treat fetuses as persons. App. 15a-18a. But it also concluded that the statutory scheme is irrational, even assuming the State's interest was legitimate. App. 18a. First, it permits the woman to dispose of embryonic or fetal tissue in any way she chooses—except that she may not leave it with the medical facility to incinerate according to its protocol for all other medical material. *Id.* Second, it permits the medical facility to cremate embryonic and fetal tissue from multiple pregnancies together. App. 19a. The panel noted that neither option (self-disposal or simultaneous cremation) is generally permitted by state law for deceased persons. App. 18a-19a. It concluded, therefore, that the new restrictions for embryonic and fetal tissue do not rationally further the State's asserted interest in treating fetal remains like the remains of a deceased person. App. 19a. (*See also* Pet. i).

Indiana sought *en banc* review only of the panel's decision to invalidate the tissue disposal provision. The court of appeals denied rehearing *en banc*.[5] Judge Wood (joined by Judges Rovner and Hamilton) concurred in that decision, agreeing that one must "wonder how, if respect for the humanity of fetal remains after a miscarriage or abortion is the state's goal, this statute rationally achieves that goal when it simultaneously allows any form of disposal whatsoever if the mother elects to handle the remains herself." App.

[5] The court initially granted *en banc* review, but after one of the judges had to recuse there were insufficient votes for *en banc* review, and the petition was denied. App. 114a-115a.

117a. Judge Easterbrook dissented (joined by Judges Sykes, Barrett, and Brennan). App. 121a-126a.

REASONS FOR DENYING THE WRIT

I. CERTIORARI IS NOT WARRANTED TO REVIEW THE CONSTITUTIONALITY OF THE EMBRYONIC AND FETAL TISSUE DISPOSAL STATUTE

The panel's decision invalidating the tissue disposal provisions does not warrant this Court's review. The decision below applies the well-settled principles of rational basis review to a statute different from all others and to a unique set of underlying facts. The only purportedly conflicting decision Indiana cites is nearly three decades old, is distinguishable, and is likely to be re-examined by the circuit in another pending case. Moreover, because the decision below rests solely on rational basis grounds, this case presents an inadequate vehicle for this Court to provide guidance to lower courts that are currently addressing different challenges to tissue disposal laws, including whether they impose an undue burden on a woman's constitutional right to abortion. With no actual split in the circuits and no guidance to be provided to the lower courts, Indiana's petition is in reality a request for this Court to correct what the State perceives to be an error in applying a basic, and properly stated, legal standard.

A. No circuit split justifies this Court's review

Indiana suggests that this Court's review of the tissue disposal provision is necessitated because a single court of appeals, nearly 30 years ago in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990), upheld a tissue disposal statute. There is, in fact, no circuit split because, as the court of appeals properly held, *Minnesota* is easily distinguishable from this case.

First, whereas in *Minnesota* the statute regulated the disposal of fetal tissue following *all* abortions or miscarriages occurring at a health facility, *see* 910 F.2d at 481 & n.2, here women may elect to assume control over the tissue and may then dispose of it in any manner whatsoever. *See* Ind. Code §§ 16-21-11-4, 6(a) (miscarriages); Ind. Code §§ 16-34-3-2(a), 3 (abortions). This exception, absent from the Minnesota law, was a critical reason for the court of appeals' conclusion that the Indiana scheme did not rationally further the State's asserted interest, as "[i]t is not hard to hypothesize disposal methods that would be far less respectful than those presently used for biological materials in clinics." (App. 117a [Wood, C.J., concurring in the denial of rehearing *en banc*]). Such a wholesale exception undercuts Indiana's asserted interest in treating fetal remains "in the same manner as other human

remains" (Pet. i), and distinguishes this case from the statute at issue in *Minnesota*.[6]

Second, the legal background against which the Minnesota statute was adopted was dramatically different from the statute challenged here. Prior to the adoption of the Minnesota statute there were no constraints on tissue disposal whatsoever, so that disposal could occur "through the sewer system or indifferent dumping of remains in landfills." 910 F.2d at 484; *see also id.* at 487 & n.16. In Indiana, by contrast, pre-existing regulations already required sanitary disposal of tissue. Perhaps because of the deficiencies in the pre-existing law, the plaintiff in *Minnesota*, as noted by the panel decision below, conceded that "the state ha[d] a legitimate interest in protecting public sensibilities." (App. 17a [quoting *Minnesota*, 910 F.2d at 488]). But this "public sensibilities" justification was not divorced from the method of disposal that the challenged statute sought to rectify: "disposal through the sewer system or the indifferent dumping of remains in landfills." 910 F.2d at 483-84. The concession that formed the basis of the Eighth Circuit's decision in *Minnesota* is absent from this case, where Indiana's pre-existing legal regime requiring sanitary incineration is markedly different, as is Indiana's asserted

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[6] Indiana claims that the Minnesota law is "[l]ike the Indiana law," because it "exempted women who have miscarriages at home and choose to dispose of the fetal remains at home." (Pet. 15). Both laws exempt miscarriages in the home. But, unlike the Minnesota law, the Indiana law also exempts women who have abortions or complete their miscarriages in a health center and choose to take the fetal remains with them.

interest. Rather than identifying a circuit split, Indiana has instead described the common-sense notion that different results may issue when parties in different cases adopt different litigation strategies when challenging a different statute in different factual circumstances.

In addition, the assertion that review is mandated by a circuit split is, at best, premature, for the Eighth Circuit has an appeal pending before it involving an embryonic and fetal tissue disposal statute that will likely take up the continuing validity of *Minnesota*. *See Hopkins v. Jegley*, 267 F. Supp. 3d 1024 (E.D. Ark. 2017), *appeal pending*, No. 17-2879 (8th Cir.). In *Hopkins*, a district court recently invalidated another tissue disposal statute, and determined that *Minnesota* is "not controlling" insofar as it was decided prior to *Casey* and *Whole Woman's Health v. Hellerstedt*, ___ U.S. ___, 136 S. Ct. 2292 (2016). *Hopkins*, 267 F. Supp. 3d at 1098. The Eighth Circuit thus now has before it a fully briefed opportunity to settle the continuing vitality of *Minnesota*, and any circuit split may therefore be ephemeral at best.

In any event, to the extent that a conflict exists between this case and *Minnesota*, it is a conflict only in the application of well-established, and agreed, legal standards as the Court in *Minnesota*, like the court of appeals here, asked whether the statute was rationally related to a legitimate governmental interest. *Minnesota*, 910 F.2d at 487-88. Certiorari is not appropriate to review the application of this well-established test to the particular facts presented here. Sup. Ct. R. 10

("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

B. This case presents a poor vehicle for considering the constitutionality of a tissue disposal law

The only question presented in this case concerning the tissue disposal statute is whether Indiana's statutory scheme is a rational means to advance the State's asserted interest in ensuring that embryonic and fetal tissue are disposed of "in the same manner as other human remains." (Pet. i). However, the two district courts other than the court in this case that have addressed embryonic and fetal tissue disposal statutes after *Minnesota* have done so by using *Casey*'s heightened "undue burden" standard. *See Whole Woman's Health v. Smith*, __ F. Supp. 3d __, 2018 WL 4225048, at *22 (W.D. Tex. Sept. 5, 2018), *appeal pending*, No. 18-50730 (5th Cir.); *Hopkins*, 267 F. Supp. 3d at 1105. Given this state of affairs, further percolation is plainly warranted. It would be premature to take up a fetal and embryonic tissue disposal case, particularly as this case, limited to the rational basis question, cannot address the "undue burden" challenges also presented in the other pending cases.

C. Certiorari is not warranted because the decision below is correct

The decision below is also correct. Certainly, this Court has repeatedly recognized that states possess an interest in "'protecting the potentiality of human life.'" *Casey*, 505 U.S. at 876 (quoting *Roe*, 410 U.S. at 162); *see also Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) ("[T]he State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child."). But this Court has never extended that interest to embryonic or fetal tissue following an abortion or miscarriage, when the potential human life can no longer be realized. In fact, as the panel below observed, the Court has declined to recognize the fetus as a human being. *See Roe,* 410 U.S. at 159 ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus [concerning when life begins], the judiciary . . . is not in a position to speculate as to the answer."); *see also id.* at 158 ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

In any event, the court of appeals correctly decided that Indiana's regime is not rationally related to the State's asserted interest. Indiana claimed that it sought to treat embryonic and fetal tissue like human remains. App. 15a. But the challenged statute permits a woman to dispose of the tissue in whatever way she chooses, so long as she takes it from the medical facility when she departs. It regulates disposal only if she decides to leave the embryonic and fetal tissue with the

facility. And that regulation, assertedly designed to ensure that the tissue is disposed of "in the same manner as human remains" (Pet. i), allows the medical facility to dispose of the tissue from multiple pregnancies together, something that Indiana law does not allow for deceased persons. App. 19a.[7] Indiana cannot propound an interest in treating embryonic and fetal tissue as if it were human remains while not treating it "in the same manner as other human remains." (Pet. i).

Admittedly, rational basis review does not mandate mathematical precision between ends and means, *see, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 484 (1970), but it also does not tolerate a statutory scheme that entirely undercuts the government's asserted justification. App. 13a. The challenged statute was properly found to be irrational.

Accordingly, there is no split in the circuits, granting certiorari would provide no guidance to the courts of appeals currently deciding broader legal challenges to tissue disposal statutes, and the decision below was correct. Certiorari is unwarranted.

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[7] In addition, nearly one-third of all non-hospital abortions are effectuated by medication, a process in which no embryonic or fetal tissue is left at the health care facility at all. Rachel K. Jones, *et al.*, *Abortion Incidence and Serv. Availability in the U. S., 2014*, 49 Persp. on Sexual and Reprod. Health 17, 21-22 (2017). Under Indiana's law, none of the tissue from these abortions need be treated "in the same manner as human remains."

II. CERTIORARI IS NOT WARRANTED TO REVIEW THE CONSTITUTIONALITY OF INDIANA'S PRE-VIABILITY ABORTION BAN

The panel's unanimous decision declaring unconstitutional the statute barring a woman from obtaining an abortion if her decision is based on certain disfavored reasons also does not warrant this Court's review. There is no circuit split; indeed, there are no other appellate decisions at all on the constitutionality of such a law. Moreover, no court has ever accepted Indiana's argument that the right to privacy countenances official interrogation of a woman's reasons for ending a pre-viability pregnancy much less a prohibition on her effectuating that decision if a state disapproves of her reasons. The court below correctly applied this Court's repeated holding that a state may not prohibit a woman from making her own decision to terminate a pregnancy before viability. Certiorari is unwarranted.

A. There is no circuit split or unsettled question of law justifying review by this Court

The decision below is the only appellate decision to address the constitutionality of a statute that prohibits a woman from obtaining an abortion for officially disapproved reasons. In the absence of any split, Indiana nonetheless urges the Court to grant certiorari to provide guidance on what it alleges "is already

a burning national issue." (Pet. 22). Yet the absence of a single other appellate decision belies this claim.

In fact, only two other states in the nation prohibit a woman from having an abortion for reasons related to disability. *See* N.D. Cent. Code § 14-02.1-04.1; Ohio Rev. Code § 2910.10.[8] The Indiana statute is much broader than either the Ohio or North Dakota statutes as it applies to virtually all disabilities, and applies regardless of any diagnosis; there need only be "the presence of some risk factors that indicate a health problem may occur." Ind. Code § 16-34-4-3. The Ohio statute is concerned only with Down syndrome and the North Dakota statute requires that there be an actual or potential diagnosis of a genetic abnormality. Ohio Rev. Code § 2919.10(B); N.D. Cent. Code § 14-02.1-04.1.

Of these two other states, only the Ohio law is the subject of litigation. A preliminary injunction has been entered against it and the state's appeal is pending in the Sixth Circuit. *See Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746 (S.D. Ohio 2018), *appeal pending*, No.

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[8] Louisiana also has such a ban, La. Rev. Stat. § 40:1061.1.2, but it is functionally meaningless because it applies only to abortions performed at a point in pregnancy when the state already bars all abortions absent a medical emergency or the presence of a medically futile pregnancy. La. Rev. Stat. § 40:1061.1(E)(1). *See June Medical Services LLC v. Gee*, 280 F. Supp. 3d 849, 863-64 (M.D. La. 2017) (concluding that plaintiff did not have standing to challenge the ban because Louisiana law already prohibits abortion at that point in pregnancy).

18-3329 (6th Cir.).[9] It would be premature to take up this case before the Sixth Circuit has even decided the case before it, and where not a single other appellate court has even weighed in on the question. And, although a total of eight states ban abortion if the woman's decision is related to the race or sex of the fetus, none of those laws has been challenged on substantive due process grounds.[10]

Two cases on the merits throughout the entire country hardly suggest a "proliferat[ion]" that "heightens the urgency of Supreme Court review now rather than later" (Pet. 26). Given that there is no circuit split, no burning question, and no unsettled area of law, certiorari should be denied.

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[9] The North Dakota ban was initially challenged, but the claim was subsequently dismissed by the plaintiff. *See MKB Mgmt. Corp. v. Burdick*, No. 1:13-cv-00071 (D.N.D. Sept. 9, 2013).

[10] *See* Ariz. Rev. Stat. Ann. § 13-3603.02 (prohibiting sex- and race-selective abortions); Ark. Code Ann. § 20-16-1904 (prohibiting sex-selective abortions); Kan. Stat. Ann. § 65-6726 (prohibiting sex-selective abortions); N.C. Gen. Stat. Ann. § 90-21.121 (prohibiting sex-selective abortions); N.D. Cent. Code § 14-02.1-04.1 (prohibiting sex-selective abortions and abortions because of genetic abnormality); Okla. Stat. tit. 63 § 1-731.2(B) (prohibiting sex-selective abortion); 18 Pa. Cons. Stat. Ann. § 3204(c) (prohibiting sex-selective abortion); S.D. Codified Laws § 34-23A-64 (prohibiting sex-selective abortion). Of these laws, only Arizona's statute has been challenged, more than five years ago, and the challenge, which was on equal protection grounds, was dismissed for lack of standing. *See NAACP v. Horne*, No. CV13-01079-PHX-DGC, 2013 WL 5519514 (D. Ariz. Oct. 3, 2013), *aff'd*, 626 Fed. App'x 200 (9th Cir. 2015).

B. Certiorari is not warranted because the decision below was correct

The decision below was also correct. It is fully in keeping with this Court's central holding regarding a woman's constitutional right to abortion, as well as the rationale underlying that right.

For more than 45 years, this Court has recognized that the right to privacy rooted in the Fourteenth Amendment "encompass[es] a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. at 153. *Casey* reaffirmed *Roe*'s essential holding that a pregnant woman has "the right . . . to choose to have an abortion before viability and to obtain it without undue interference from the State." *Casey*, 505 U.S. at 846. This is because "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* This Court has never wavered from this essential holding. *See Whole Woman's Health*, 136 S. Ct. at 2309 (reiterating that an "undue burden" exists when a state imposes "a substantial obstacle in the path of a woman's choice" [quoting *Casey*, 505 U.S. at 877]); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (reciting the "established principle[ ] [that] . . . before 'viability . . . the woman has a right to choose to terminate her pregnancy.'" [quoting *Casey*, 505 U.S. at 870]).[11] Therefore, as the court of appeals properly

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[11] Indiana relies on *Gonzales v. Carhart*, *supra*, to argue that the Court has already approved "a ban on one particular 'type of abortion.'" (Pet. 29). But the law upheld in *Gonzales* did not

recognized, this Court has made clear that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879 (as cited at App. 10a).

Indiana ignores the clarity of this precedent and argues instead that a woman's right to make the decision whether to terminate a pregnancy, recognized in *Roe*, *Casey*, and their progeny, protects only the "binary choice" either to bear a child or not, and that the constitutional right is therefore contingent upon the woman's particular reason for making the decision. Some reasons are acceptable; others are not, and the question of which reasons fall on which side of the line is, according to Indiana, a question for the State to decide. Therefore, if Indiana deems the reason to be unacceptable, the right of a woman to determine previability whether or not to have an abortion simply does not exist.

This cramped understanding is antithetical to the actual right described in *Casey*, which stressed that the decision as to whether to obtain an abortion or bear a child is a product not of a binary choice but of a personal decision influenced by "intimate views with

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prohibit any woman from obtaining an abortion. Rather, it prohibited one rarely used *method* of abortion, leaving women free to obtain abortions using alternative methods. Indeed, it was precisely because the partial-birth abortion ban left "availab[le] other procedures that are considered to be safe alternatives" that the Court upheld the ban. 550 at 167; *see also id.* at 165 ("Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.").

infinite variation." *Casey*, 505 U.S. at 853. *Casey* recognized that this is a highly personal decision that must be left to women to make based on their own values and beliefs. *See id.* (explaining that the right to privacy involves "personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it" and recognizing that individuals hold competing views with some believing that "the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent").[12]

It is precisely this "dimension of personal liberty" that Indiana's binary-choice theory ignores.[13]

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[12] Indiana wrongly claims (Pet. 14) that the fact that some women and families may choose abortion in the face of a diagnosis of a fetal abnormality they feel unequipped to handle was "a choice not contemplated at the time of" *Roe* and *Casey*. *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 389 n.8 (1979) ("The plaintiffs-appellees introduced evidence that modern medical technology makes it possible to detect whether a fetus is afflicted with such disorders as Tay-Sachs disease and Down's syndrome. . . ."); *see also Harris v. McRae*, 448 U.S. 297, 340 (1980) (Marshall, J., dissenting) ("Finally, federal funding is unavailable in cases in which it is known that the fetus will be unable to survive. In a number of situations it is possible to determine that the fetus will suffer an early death if carried to term."); *Doe v. Bolton*, 410 U.S. 179, 207 (1973) (considering a statute that banned abortion with certain exceptions including that "[t]he fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect").

[13] Indiana's novel binary-choice formulation does not even save its own statute. As noted above, women may decide that they will have an abortion if they ever become pregnant because their age, disability, or genetic factors indicate that any pregnancy may have a "potential diagnosis" of disability. Under the challenged

Regardless of the perceived importance of a particular state interest prior to viability, this Court has held that a state's interest in fetal life does not become strong enough to allow it to prohibit the abortion until viability. *Roe*, 410 U.S. at 164. *Casey* recognizes that a state may have interests in encouraging all fetal life, 505 U.S. at 846, but pre-viability the "interests are not strong enough to support a prohibition of abortion." *Id.* Instead, there is a "'private realm'" from which the state is barred. *Id.* at 851 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

Were states permitted to prohibit abortions for what they deemed to be a sufficiently important interest, it would invite impermissibly intrusive government inquiries into individuals' most private decisions. A woman could be required to demonstrate that she was not seeking her abortion for "incorrect" reasons, and the sincerity of her explanation could become subject to governmental investigation. As the court of appeals concluded, "[n]othing in the Fourteenth Amendment or Supreme Court precedent allows the State to invade this privacy realm to examine the underlying basis for a woman's decision to terminate her pregnancy prior to viability." App. 13a.

Moreover, to uphold Indiana's view would lead to perverse results. It would mean that even though states cannot compel a woman to continue a healthy

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law these women are denied the ability to obtain an abortion despite having made the "binary choice" to obtain one in the event of any pregnancy.

pregnancy, it could compel her against her will to continue a pregnancy where it is virtually certain that the child will die in infancy. This cannot be reconciled with the "deep, personal character" of the right here. *Casey*, 505 U.S. at 853.[14]

Indiana's argument that the right to an abortion protects only a binary choice is antithetical to this Court's specific and repeated holdings that prior to viability a woman has a constitutional right to decide whether or not to continue her pregnancy and to the underlying right of privacy. No court has held otherwise. The decision below, correctly applying this well-settled precedent, does not warrant certiorari.

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[14] Additionally, as noted by the American Congress of Obstetricians and Gynecologists, a statute like the challenged statute might very well force women to "withhold information or outright lie," thus preventing women from discussing their health care choices openly with their doctor at a time when "honest, empathetic health counseling is in order." ACOG Statement on Abortion Reason Bans, Mar. 10, 2016, at https://www.acog.org/About-ACOG/News-Room/Statements/2016/ACOG-Statement-on-Abortion-Reason-Bans?IsMobileSet=false (last visited Nov. 28, 2018).

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 18-483

IN THE
Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF OF PETITIONER

The Indiana statutes at stake protect the inherent dignity of every human being, born and unborn, before and after death, without infringing on a woman's constitutional right to decide whether to bear or beget a child. The fetal disposition provision only requires the cremation or burial of aborted or miscarried fetal remains and does not prevent a single woman from having an abortion. And the anti-discrimination provision—or "eugenics" statute, as Judge Easterbrook called it, Pet. App. 121a—protects fetuses from being aborted solely because of disfavored characteristics frequently protected by American law, namely race, sex, and disability.

Planned Parenthood does not refute the national importance of these issues. Nor can it: As the numerous supporting amici demonstrate, debates over the ethics of discriminatory abortion and the proper disposal of fetal remains permeate the country. And while Planned Parenthood struggles to concoct new and creative ways to reconcile the Seventh Circuit and Eighth Circuit decisions, there is no escaping the bottom line: Minnesota may require fetal remains to be buried or cremated while Indiana may not.

With no vehicle problem to cite, Planned Parenthood's only argument against certiorari is that the issues presented need further percolation. But some issues are too important to put off for another day. The Court should grant certiorari to address these nationally important issues before the atrocities they portend become reality.

ARGUMENT

I. The Circuit Split on the Fetal Disposition Issue Is Real

A. The Seventh Circuit's holding conflicts with the Eighth Circuit's decision in *Planned Parenthood of Minnesota v. Minnesota*

The Eighth Circuit upheld Minnesota's fetal disposition statute in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). But the Seventh Circuit in this case struck down Indiana's fetal disposition statute, which is "substantially similar in every material respect." Pet. App. 39a (Manion, J., dissenting). The result is that Minnesota can require burial or cremation of fetal remains, but Indiana cannot. The decisions reach irreconcilable positions as to materially identical laws, and—particularly given the equally divided *en banc* Seventh Circuit—only this Court can decide which of these positions is correct.

1. Planned Parenthood argues that *Planned Parenthood of Minnesota* is distinguishable because the Indiana statute allows women to dispose of aborted or miscarried fetal remains themselves. Br. in Opp. to Cert. 10. But as Planned Parenthood begrudgingly recognizes, *id.* at 11 n.6, the Minnesota law *also* exempts women who miscarry at home and choose to dispose of the fetal remains themselves. *See Planned Parenthood of Minn.*, 910 F.2d at 488; *see also* Minn. Stat. § 145.1621(3) (applying only to abortions or miscarriages occurring "at a hospital, clinic, or medical

facility"). The Eighth Circuit found that exception permissible on grounds of personal privacy, *Planned Parenthood of Minn.*, 910 F.2d at 488, and while Indiana also specifies that mothers may dispose of the remains where the abortion or miscarriage occurs at a healthcare facility, that nuance adds no new legal question unaddressed by the Eighth Circuit. A woman who miscarries or aborts at a clinic also has a personal privacy interest in disposing of the remains of her child as she sees fit.

2. Planned Parenthood next attempts to tie the Eighth Circuit's holding to Minnesota's previous lack of sanitary disposal laws. This is a new and desperate distinction. Like Indiana's statute, the Minnesota statute requires healthcare facilities to dispose of fetal remains differently than they dispose of ordinary medical waste. *Planned Parenthood of Minn.*, 910 F.2d at 483 n.4. Accordingly, when Minnesota defended its law, it had to rely on the legislature's authority to require dignified treatment of fetal remains. *Id.* at 488.

Furthermore, the supposed distinction in the respective States' rationales is both hyper-analytical and irrelevant to the existence of a circuit conflict. The differing outcomes in the cases as to materially identical statutes cannot possibly be justified by reference to the regulatory scheme that each statute *replaced*.

First, the existence *vel non* of a circuit conflict does not depend on the congruence of arguments presented

by the parties; rather, it depends on whether the circuits have reached irreconcilable holdings as to materially identical laws. Here, they have. The Eighth Circuit says Minnesota (and therefore the other States in the circuit) may enforce a law requiring cremation or burial of aborted or miscarried fetal remains; the Seventh Circuit says Indiana (and therefore Illinois and Wisconsin) may not do the same. Those decisions are irreconcilable. Particularly because in both cases any *conceivable* legitimate rationale would suffice, the different outcomes cannot be explained by supposedly different state interests.

Second, the interests advanced by Indiana in this case and those relied on by the Eighth Circuit are not "meaningfully different." As Judge Manion explained in dissent, "the same state interest is involved in both cases." Pet. App. 40a. (Manion, J., dissenting). The introductory portion of the Minnesota statute specifically refers to "providing for the *dignified* and sanitary disposition of the remains of aborted or miscarried human fetuses." Minn. Stat. § 145.1621 (emphasis added). If aborted fetuses have no dignity worth protecting, there would be no reason to safeguard against offense of "public sensibilities" in the disposition of fetal remains. Judge Manion recognized that "[w]hether you call it 'public sensibilities,' 'morality,' or 'human dignity,' the state interest is the same." Pet. App. 40a. (Manion, J., dissenting). In both cases, it is the human dignity of the fetus that elevates it above ordinary medical waste, and it is the human dignity of the fetus that triggers public sensibilities with regard to disposition of its remains.

In short, the Seventh Circuit has held that a fetus's lack of Fourteenth Amendment rights *prohibits* States from requiring that fetal remains be treated with human dignity, while the Eighth Circuit has held to the contrary. Only this Court can resolve this critical, fundamental conflict as to whether States may require medical personnel to dispose of fetal remains in a dignified way on par with other human remains.

3. Nor is the validity of *Planned Parenthood of Minnesota* threatened by the pending appeal of an Arkansas fetal disposition statute in *Hopkins v. Jegley*, 267 F. Supp. 3d 1024 (E.D. Ark. 2017). There, the district court invalidated a fetal disposition statute because it required the consent of the woman's sexual partner for disposition of the fetal remains—a provision not included in the Minnesota or Indiana statutes and which presents potential conflicts with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 893–94 (1992) (invalidating spousal notification requirement). *Hopkins*, 267 F. Supp. 3d at 1098–1104. No matter the outcome in *Hopkins*, the vitality of *Planned Parenthood of Minnesota* is not threatened.

Because of the conflicting answers of two circuits, Minnesota can enforce its statute providing for the dignified disposal of human fetal remains, but Indiana cannot enforce its substantially similar statute. This Court should grant certiorari to decide which of these irreconcilable positions is correct.

B. This case is a proper vehicle to resolve the split over whether States have legitimate interests in human dignity of fetal remains

Curiously, Planned Parenthood next argues that, notwithstanding a circuit conflict over whether a fetal remains statute violates the Fourteenth Amendment as an arbitrary exercise of government power, the Court should deny certiorari because it—Planned Parenthood—failed also to claim that Indiana's fetal remains statute violates the right to abortion. To say the least, it is hard to see the logic of eschewing resolution of one constitutional claim that already divides the circuits merely because different constitutional claims bearing on the same general subject are pending in lower courts.

The logic of taking that approach is especially hard to follow in light of the abortion-rights cases Planned Parenthood cites. As explained above, in contrast with this case, the statute invalidated by the district court in *Hopkins* prompted an undue-burden abortion-rights claim because it requires the consent of the woman's sexual partner before the final disposition of the fetus. 267 F. Supp. 3d at 1098–1104. *Hopkins* is, at heart, a spousal-interference case, not a fetal-disposition case, so questions about the proper legal standard and outcome have no bearing on the appropriate standard and outcome in this case.

Separately, the district court's decision in *Whole Woman's Health v. Smith*, No. A-16-CV-01300-DAE, 2018 WL 4225048, at *14 (W.D. Tex. Sept. 5, 2018),

actually underscores the need for review here. There, the court held that, even if a fetal-disposition law advances legitimate state interests in protecting the human dignity of fetal remains, *id.* at *14, doing so imposes an undue burden on the right to abortion by endorsing a particular viewpoint about the humanity of the fetus, *id.* at *19 ("The challenged laws also impose intrusive and heavy burdens on women whose beliefs about the status of embryonic and fetal tissue and the meaning of abortion or miscarriage diverge from the viewpoint endorsed by the State.").

While the *Smith* court's self-contradictory explanation casts the issue in the terminology of undue burden, it addresses precisely the same substantive question resolved by the courts below—*i.e.*, whether, notwithstanding the right to abortion (and a fetus's concomitant lack of Fourteenth Amendment personhood), States may require burial or cremation of fetal remains based on a view that such remains are imbued with human dignity. *See* Pet. App. 69a ("[I]f the law does not recognize a fetus as a person, there can be no legitimate state interest in requiring an entity to treat an aborted fetus *the same* as a deceased human." (emphasis in original)). Accordingly, *Smith* adds no new dimension to the dispute squarely presented here, and its existence only reinforces the national importance of the fetal disposition issue.

II. The Non-Discrimination Issue Is a Question of National Importance that Merits Resolution by this Court

A. The stakes are too high to await further percolation

New non-invasive genetic testing early in pregnancy has led to an increase in the number of babies that are aborted simply because they have Down syndrome or another disability. *See* Pet. for Writ of Cert. 6–7; Pet. App. 32a–33a; Amicus Br. of Wisconsin 21–23; Amicus Br. of Alliance Defending Freedom 7–9; Amicus Br. of Restoration Project 25–26; Amicus Br. of Foundation Jerome Lejeune 4–5.

Planned Parenthood does not contest this scientific fact. Instead, it argues that "[a]llowing women and their families the freedom to make that decision for themselves is the best way to ensure that the mother and her family will be able to create and maintain an environment in which a disabled child is likely to thrive." Br. in Opp. to Cert. 2. In other words, systematically eliminating children with Down syndrome from our society is preferable to allowing them to be born into the "wrong" families. Surely the Constitution does not require States to embrace this neo-eugenic viewpoint.

Planned Parenthood argues not that this issue is unimportant but that the Court's review would be premature because not enough appellate courts have considered it. But the critical criterion for certiorari is

national importance, not merely circuit conflict: Certiorari is warranted where, as here, "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). When the issue is important enough, the Court does grant certiorari, even absent a circuit conflict, to consider the constitutionality of state laws affecting individual constitutional rights. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 551 U.S. 1192 (2007). As here, *Crawford* involved an up-and-coming issue of national importance (there, Indiana's Voter ID law) where other States were already implementing regulations similar to those being challenged but no other federal circuit had yet addressed the issue. Pet. for Writ of Cert. at 15, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (No. 07-21). States, just like civil rights plaintiffs, have an interest in timely resolution of fraught, nationally significant questions of constitutional law.

As Planned Parenthood acknowledges, eight other States currently have bans on sex-selective abortion, three States ban disability-selective abortion, and one bans race-selective abortion. *See* Br. in Opp. to Cert. 17–18 & ns. 8, 10. Moreover, at least two other States—Pennsylvania and Utah—have recently considered enacting similar bans. *See* Michelle L. Price, *Utah House Oks Bill Banning Abortions Based on Down Syndrome*, U.S. News & World Report, Feb. 5, 2018, https://www.usnews.com/news/best-states/utah/articles/2018-02-05/utah-house-oks-bill-banning-abortions-based-on-down-syndrome; Avery Anapol, *Pennsylvania House Passes Bill Banning Abortions*

for Down Syndrome, The Hill, Apr. 16, 2018, https://thehill.com/homenews/state-watch/383456-pennsylvania-house-passes-bill-banning-abortions-for-down-syndrome.

Furthermore, the discriminatory abortion issue has received attention around the world. *See* Cert. Pet. 22–26. Planned Parenthood's own medical director, Dr. Stutsman, admitted in his deposition that approximately half of all babies with Down syndrome are aborted. Appellants' App. 70. And in Iceland and other European countries, that number approaches 100%. Cert. Pet. 26.

The decisions below say that the Constitution prevents States from acting to prevent such systematic elimination of those with disabilities or other undesirable characteristics through private choice. In light of the importance of that issue, further percolation is unwarranted, especially given the separate dissents of Judges Manion and Easterbrook, which fully vet the arguments. As Judge Easterbrook observed, Pet. App. 122a–23a, only this Court can provide the definitive answer.

B. Indiana is not asking the Court to revisit *Roe*, *Casey*, or any other abortion precedents

The Court may uphold Indiana's anti-discrimination statute on its face without disturbing any of its abortion precedents, including *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Those

cases protect abortion only to effectuate the binary choice of "whether to bear or beget a child," *Casey*, 505 U.S. at 896 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)), not to terminate a particular pregnancy only because the child possesses disfavored characteristics. Accordingly, the Court need not disturb those cases to rule Indiana's way.

In addition, the Court has not decided whether *Roe* and *Casey* protect a right to decide *which* child to bear in any other of its prior abortion decisions, including the cases cited by Planned Parenthood. *See* Br. in Opp. to Cert. 21 n.12. In *Harris v. McRae*, 448 U.S. 297, 340 (1980), a dissenting justice noted the unavailability of federal funding for aborting a fetus that may not survive, which at most amounts to an acknowledgment that abortions in such circumstances occur. In *Colautti v. Franklin*, 439 U.S. 379, 389-90 (1979), the Court mentioned the *argument* that a law prohibiting abortion where a fetus may be viable could be unconstitutional because it could affect abortions based on genetic abnormality detected at 18–20 weeks gestational age, but expressly decided the case on other (fair-notice) grounds. And the abortion ban in *Doe v. Bolton*, 410 U.S. 179, 205–07 (1973), exempted fetuses with genetic abnormalities, so the Court had no reason to address the issue.

Planned Parenthood tries to generate conflict between the State's position and *Roe* and *Casey* by suggesting that Indiana's anti-discriminatory abortion law would interfere with abortion by a woman who decides she is too old to have *any* child due to the risk of genetic abnormality. *See* Br. in Opp. to Cert. 21–22

n.13. In that case, the theory goes, the woman would be making a binary abortion decision—no child, period—yet would be stymied because Indiana law precludes abortion based solely on a "potential diagnosis" of a disability. First, however, it is not clear the statute would apply in that circumstance since the woman would be choosing abortion based on *her own* characteristics, not the actual characteristics of the child. Second, even if in that limited circumstance the Indiana law must give way to the binary right defined by *Roe* and *Casey*, that would not justify facial invalidation of the statute as to all other applications of the statute that do *not* implicate the right defined by *Roe* and *Casey*. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)).

Accordingly, to prevail here, Indiana need not, and does not, urge the Court to use this case as a vehicle to overturn *Roe*, *Casey*, or any other of its abortion precedents. It asks the Court only to address whether the abortion right protected by those precedents is so broad that it safeguards even discriminatory abortions. The Court has never before addressed this issue; it should do so now.

CONCLUSION

The petition should be granted.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF ALLIANCE DEFENDING FREEDOM AND THE RADIANCE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Alliance Defending Freedom is an alliance-building legal organization that advocates for the right of people to freely live out their faith. Alliance Defending Freedom is committed to advancing legal protection for all human life, from conception to natural death, and supports efforts to end discrimination on the basis of race, sex, disability, or genetic makeup.

The Radiance Foundation is an educational, non-profit organization that, through journalism, multimedia presentations, and community outreach, is committed to empowering and motivating people to illuminate the inherent value of every human life, including racial minorities, women, and those with disabilities. The Foundation believes that every human life has purpose and is created with irreplaceable intrinsic value.

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[1] Pursuant to this Court's Rule 37.2, Amici state that counsel were timely notified of this brief. All parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, Amici state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Most Americans believe that discrimination based on race, sex, and disability is illegal in the United States. But they are wrong when it comes to unborn children. In most states, if a mother desires to have a son, she can abort her child simply for being a daughter. The same is true if the mother rejects her child because of his or her race, ethnicity, or disability.

Indiana sought put a stop to such inhumane discrimination. In 2016, it passed the Abortion Nondiscrimination Provision. The law prohibits invidious discrimination by outlawing abortion based solely on an unborn child's race, sex, disability, or genetic makeup.

Respondent Planned Parenthood sued Indiana to vindicate discrimination against unborn children. And the Seventh Circuit agreed that there is nothing wrong with such invidious discrimination, provided it occurs in utero. According to the Seventh Circuit, the right to abortion that this Court announced in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), is categorical, subject to no reasonable limits. *Planned Parenthood of Indiana and Kentucky, Inc.*, v. *Commissioner of the Indiana State Department of Health, et al.*, 888 F.3d 300, 305 (7th Cir. 2018). So, the Seventh Circuit said, a state may never prohibit a pre-viability abortion, including one predicated solely on an unborn child's race, sex, disability, or genetic makeup. That result is dangerous to women and minorities and may result

in the permanent eradication of entire populations, such as individuals with Down syndrome.

The Seventh Circuit's view of *Casey* is erroneous. This Court has already authorized limits on pre-viability abortions. *E.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124 (2007) (upholding the federal Partial-Birth Abortion Ban Act of 2003). And this Court has never suggested there is an unmitigated right to abort an unborn child because of his or her race, sex, disability, or genetic makeup.

In fact, Indiana's anti-discrimination provision is precisely the kind of law that survives *Casey*. The law does not interfere with the general right to abortion as this Court articulated it in *Casey*. The discrimination ban is narrowly tailored to target invidious discrimination against unborn children whom no one would contest would be members of protected classes if allowed to be born. And, as Judge Manion explained in his concurrence and partial dissent, "[s]urely Indiana has a compelling interest in attempting to prevent this type of private eugenics." 888 F.3d at 311.

Indiana's elimination of prenatal discrimination promotes universal human equality and places it at the forefront of those advocating for women, minorities, and the disabled. Accordingly, *Amici* urge this Court to grant certiorari, reverse the Seventh Circuit, and uphold the government's ability to outlaw discrimination at every stage of life, including before birth.

ARGUMENT

This Court has never categorically precluded pre-viability limitations on abortion. In fact, in *Gonzales* v. *Carhart*, this Court upheld the federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. §1531 (2003)—even as applied to abortions performed before viability. 550 U.S. 124 (2007).

The Seventh Circuit failed to fully analyze the Abortion Nondiscrimination Provision under this Court's abortion jurisprudence, effectively ignoring the State's interest in protecting unborn human life. See, *e.g.*, *Casey*, 505 U.S. at 846 (requiring courts to determine if an abortion law furthers a valid state interest such as the protection of unborn human life or imposes an "undue burden" by placing a "substantial obstacle" in the path of a woman seeking an abortion). A proper application of *Casey* will result in Indiana's discrimination ban being upheld.

I. The State of Indiana's interest in protecting unborn human life from discriminatory abortions is supported by this Court's jurisprudence and medical advances in genetic testing.

This Court has never recognized a right to abort an unborn child because of his or her race, sex, disability, or genetic makeup. Conversely, this Court in *Casey* did recognize the State's interest in protecting unborn human life. The *Casey* Court's prescient acknowledgement of this interest is especially important here, as it could not have envisioned the technological advances that now

increasingly threaten unborn children with discrimination.

A. The Seventh Circuit ignored the State of Indiana's interest in protecting unborn human life, particularly in the context of race, sex, and disability discrimination.

This Court has never endorsed a right to a discriminatory abortion. Instead, it has repeatedly underscored that one of the "essential holdings" of *Roe v. Wade*, 410 U.S. 113 (1973), is that "the State has legitimate interests from the pregnancy's outset in ... the life of the fetus that may become a child." *Carhart*, 550 U.S. at 125.

The Seventh Circuit improperly dismissed the importance of the State's interest in the life of the unborn child. Rather than evaluating the State's compelling interest, it erroneously presumed that there exists a constitutional right to abort an unborn child *because of* his or her race, sex, disability, or genetic makeup.

On the contrary, "[i]t is important to make the distinction between a pregnant woman who chooses to terminate the pregnancy because she doesn't want to be pregnant, versus a pregnant woman who wanted to be pregnant, but rejects a particular fetus . . . ." *See* Marsha Saxton, *Disability Rights and Selective Abortion*, Abortion Wars, A Half Century of Struggle: 1950 to 2000 (Univ. of Cal. Press, 1998) chap. 18.

Picking and choosing among particular children raises the specter of abortion as "a wedge into the

'quality control' of all humans. If a condition (like Down[] syndrome) is unacceptable, how long will it be before experts use selective abortion to manipulate – eliminate or enhance – other (presumed genetic) socially charged characteristics ...?" *Id.* Taking Planned Parenthood's arguments to their logical conclusion, it would be appropriate to abort children who are too short or too tall, might someday develop scoliosis, or have a propensity for male-pattern baldness. Indeed, such selectivity reflects the beliefs of the organization's founder. Margaret Sanger, *The Eugenic Value of Birth Control Propaganda* (Oct. 1921), *available at* https://bit.ly/1RdWZpf ("the most urgent problem today is how to limit and discourage the over-fertility of the mentally and physically defective").

Perhaps for these reasons, this Court has never endorsed a right to abort children only because they are the undesired sex or have been diagnosed with a genetic abnormality or disability. In *Casey*, this Court, quoting approvingly from *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), declared that the abortion liberty pertained to "the decision whether to bear or beget a child," *Casey*, 505 U.S. at 851. This Court has never framed the constitutionally protected abortion decision as whether to bear or abort a *particular* child based on his or her race, sex, disability, or genetic makeup. It is difficult to imagine where such a constitutional right would even originate.

B. This Court could not have envisioned advances in genetic testing that are increasingly leading to discriminatory abortions.

At the time of the *Casey* decision, options for prenatal testing were limited. For example, sonography and other techniques for fetal imaging were not as developed as they are today, and ultrasound screening for Down syndrome was not yet a standard practice. See R. A. Kadir & D. L. Economides, *The Effect of Nuchal Translucency Measurement on Second-trimester Biochemical Screening for Down Syndrome*, 9 Ultrasound in Obstetrics and Gynecology 244–247 (1997).

Since *Casey*, prenatal genetic testing capabilities have greatly advanced, fundamentally altering the landscape of prenatal care. Innovations in sonography and magnetic resonance imaging (MRI), for instance, now enable ultrafine visualization of structural abnormalities associated with genetic disorders and congenital defects. Standard practice for prenatal testing now includes screening for genetic conditions, including Down syndrome within the first trimester. R. Akolekar et. al., *Procedure-related Risk of Miscarriage Following Amniocentesis and Chorionic villus sampling: a systematic review and meta-analysis*, 45 Ultrasound in Obstetrics & Gynecology 16–26 (2015); Practice Bulletin No. 163, 127 Obstetrics & Gynecology (2016).

A particularly significant development has been the advent of non-invasive prenatal testing (NIPT), a simple and risk-free method of screening for major genetic disorders and determining the unborn child's sex. NIPT requires a simple blood draw from the arm of the mother to derive DNA originating from the placenta. NIPT is considered reliable from as early as 10 weeks gestation. Accordingly, many medical professional societies have revised their official guidelines for genetic screening to include NIPT. *See id.*; see also Anthony R. Gregg et al., *Noninvasive prenatal screening for fetal aneuploidy, 2016 update: a position statement of the American College of Medical Genetics and Genomics,* 18 Genetics in Medicine 1056–1065 (2016).

In 2016, the American Congress of Obstetricians and Gynecologists (ACOG) began recommending that clinicians offer genetic testing, including NIPT, to all pregnant mothers, not just those at elevated risk, as per previous guidelines. Practice Bulletin No. 163, *supra.* NIPT has been offered since 2011 by a number of commercial providers and has grown into a substantial and largely unregulated industry. Megan Allyse et al., *Non-invasive prenatal testing: a review of international implementation and challenges,* 7 International Journal of Women's Health 113-26 (2015); see also Subhashini Chandrasekharan et al., *Noninvasive Prenatal Testing Goes Global,* 6 Science Translational Medicine 231 (2014).

The proliferation of NIPT makes a significant amount of genetic information available early in pregnancy. While current NIPT screening emphasizes the major trisomies as well as the unborn child's sex, emerging refinements are already allowing for a more detailed genetic analysis. In the future, NIPT might offer the potential to sequence the entire fetal genome, enabling screening not only for chromosomal abnormalities, but for genetic markers of specific inheritable traits. Ioanna Kotsopoulou et al., *Non-invasive prenatal testing (NIPT): limitations on the way to become diagnosis*, 2 Diagnosis 141–158 (2015).

This capability, coupled with the ability to terminate unborn children with undesired genetic make-ups, raises legal and ethical concerns. The State of Indiana has a legitimate interest in ensuring that such technology is not used for discrimination.

II. The Abortion Nondiscrimination Provision advances the State of Indiana's interest in preventing racial and sex discrimination.

Congress and state governments have long track records of protecting against race- and sex- based discrimination. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq.* (1964), forbids employment discrimination based upon sex, race, color, religion, or national origin. Other laws similarly protect against discrimination in education, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 (1972); athletics, *id.*; health insurance, Patient Protection and Affordable Care Act, Pub. L.,

124 Stat. 119, *et seq.* (2010); housing, Fair Housing Act, 42 U.S.C. § 3601, *et. seq.* (1968); pay, Equal Pay Act of 1963, 29 U.S.C. §206, *et. seq.* (1963). Each of the 50 States have also enacted laws prohibiting race- and sex-based discrimination. *See, e.g.,* IND. CODE § 22-9-1-2, *et. seq.* (2017) (prohibiting race- or sex-based employment discrimination).

This compelling interest in eradicating race- and sex-based discrimination extends to protecting unborn children in the womb, as discriminatory abortions are being practiced not just in other countries, but in the United States. Charlotte Lozier Institute, *Sex-Selection Abortion; The Real War on Women*, April 13, 2016, *available at* https://bit.ly/2zTaNE4 ("[p]renatal sex discrimination crosses cultural, ethnic, and national lines. It is practiced with impunity in many countries, including the U.S., via sex-selective abortion – choosing to abort a preborn child based solely on the child's sex.")

Even advocates of abortion rights recognize the need to protect against sex-selective abortion practices. For example, in 2013, the European Parliament, which recently declared abortion to be a "fundamental human right," adopted a report describing sex-selection abortions as instances of "ruthless sexual discrimination." Motion for a European Parliament Resolution on Progress on Equality between Men and Women in the European Union, Eur. Parl. Doc. A8-0015/2015(2015), *available at* https://bit.ly/2PpaoUx. In addition, The United Nations Entity for Gender Equality and the Empowerment of Women found prenatal sex selection to be an "act of violence against women." Platform for

Action by The United Nations Fourth World Conference on Women, Beijing, China – September 1995, *available at* https://bit.ly/1uKJWCZ.

The State of Indiana has a compelling interest in protecting against discrimination in all forms, including abortions targeting unborn children because they are girls, disabled, or members of minority races. Indiana's Nondiscrimination Provision properly advances this interest and is in the tradition of federal and state laws that prohibit discrimination.

III. Indiana's Abortion Nondiscrimination Provision advances the State's interest in preventing disability and genetic discrimination.

Sadly, discrimination against those with disabilities or genetic abnormalities—including efforts to prevent the birth of a child with a disability or genetic abnormality—has been a well-documented problem in the United States. When reviewing the Genetic Information Non-Discrimination Act of 2008, 42 U.S.C. § 2000ff-5 (2008), the Senate commented on this tragic history:

> The early science of genetics became the basis of State laws that provided for the sterilization of persons having presumed genetic 'defects' such as mental retardation, mental disease, epilepsy, blindness, and hearing loss, among other conditions. The first sterilization law was enacted by the State of Indiana in 1907. By 1981, a majority of States adopted sterilization laws to 'correct'

> apparent genetic traits or tendencies. Many of these State laws have since been repealed, and may have been modified to include essential constitutional requirements of due process and equal protection. However, the current explosion in the science of genetics, and the history of sterilization laws by the States based on early genetic science, compels Congressional action in this area. [S.Rep. No. 110-28(I).]

Importantly, with the American with Disabilities Act of 1990, 42 U.S.C. §12101, *et. seq.* (ADA) and the ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat 3553, *et. seq.* (2008), Congress has acted to prohibit discrimination against persons with physical or mental disabilities in employment, public services and accommodations, public transportation, and telecommunications. In passing the ADA, Congress found that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination..." 42 U.S.C. §12101(a).

Congress later passed the Genetic Information Nondiscrimination Act of 2008. 42 U.S.C. §2000ff-5. The law's purpose was to "fully protect the public from discrimination and allay their concerns about the potential for discrimination" based upon their genetic makeup. S.Rep. 110-28(I). Congress has recognized that discrimination based upon genetic makeup is wrong. It has also recognized that the disabled have the right to "fully participate in all aspects of society." 42 U.S.C. § 12101(a)(1). The Abortion

Nondiscrimination Provision simply extends these protections to include birth itself.

Again, even individuals who advocate for abortion rights expressed discomfort and dismay at the use of disability-selective abortion. *E.g.*, Amy Harmon, *Genetic Testing + Abortion = ???*, N.Y. Times, May 13, 2007, *available at https://nyti.ms/2z6Y3u2*. Indeed, "many [supporters of abortion rights] are finding that, while they support a woman's right to have an abortion if she does not want to have a baby, they are less comfortable when abortion is used by women who don't want to have a particular baby." *Id.*

The disquiet is felt beyond our country's borders. For example, the United States is a signatory to the Convention on the Rights of the Child, which states that a child "needs special safeguards and care, including appropriate legal protection, *before as well as after birth*." Preamble to Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added).

And recently, the U.N. Committee on the Rights of Persons with Disabilities declared that "[l]aws which explicitly allow for abortion on the ground of impairment violate the Convention on the Rights of Persons with Disabilities." The Convention also noted that even when a prenatal disability diagnosis is correct, allowing for disability selective abortion "perpetuates notions of stereotyping disability as incompatible with a good life." Susan Yoshihara, *Another U.N. Committee Says Abortion May be a Right, But Not on Basis of Disability*, C-FAM, Center for Family and Human Rights, Oct. 26, 2017, *available at* https://bit.ly/2z4XHUy.

IV. Discriminatory abortions are dehumanizing.

If government desires to eradicate discrimination predicated on race, sex, disability, and genetic makeup, it must ensure that this protection begins in the womb. When the government sanctions the abortion of unborn children based on their race, sex, disability, or genetic makeup, the government actively affirms a social reality in which racial minorities, women, and the disabled are marginalized and dehumanized. In other words, discriminatory abortions are sought because of perceived undesirable characteristics of the unborn child; if such discrimination is allowed for those who are inside the womb, it will be sanctioned outside the womb, too.

As Desmond Tutu wisely cautioned, "abominations such as apartheid do not start with an entire population suddenly becoming inhumane. They start here. They start with generalizing unwanted characteristics across an entire segment of a population." Andrea Christina Nill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 Harv. Latino L. Rev. 35, 35 (2011). Yet the whole purpose of sex-selective and like abortions is to eliminate unwanted characteristics.

Given that reality, Indiana wisely decided not to be silent. If the law condones discrimination in utero, it will teach the same after birth:

> The question was raised in the past: how does the law engage in moral teaching? The answer was that it teaches through the laws.

> When we legislate against racial discrimination in private inns and restaurants, we remove discrimination from the domain of private tastes and treat it as a matter of moral consequence. Between 1963 and 1966, opinion in the [S]outh came to be parallel with opinion in the North, with majorities in both sections holding to the wrongness of racial discrimination. We may ask: why did the culture of the [S]outh change so strikingly in three years? Did it have something to do with the new moral lessons being taught at the top of the state and taught dramatically with the laws? [Hadley P. Arkes, *The Role of Government in Shaping Culture*, 102 Nw. U. L. Rev. 499, 500 (2008).]

By enacting the Abortion Nondiscrimination Provision, the State of Indiana has chosen to affirm its interest in eradicating discrimination and to change its law to protect those in the womb from discriminatory abortions. By doing so, it is sending a clear message to its citizens that all victims of discrimination are worthy of protection.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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KRISTINA BOX, COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *ET AL.*,
Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND PARENTS OF DISABLED CHILDREN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to combating the injustice of denying human rights to unborn children and has filed as amicus in previous abortion cases in this Court.

Amici parents (listed in an Appendix to this brief) are the parents of children born with various disorders including Down Syndrome, Noonan Syndrome, Patau Syndrome, Turner Syndrome, Edwards Syndrome, Meckel-Gruber Syndrome, Potter Syndrome, spina bifida, and congenital heart disease, among others. Learning of these prenatal diagnoses did not change the love these parents felt for their children. Though many of these families ultimately lost their children, these parents do not consider that to have diminished the importance of the children's lives. Indiana's law protects children like theirs and recognizes that unborn children deserve protection from invidious discrimination.

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[1] Counsel of record for the parties received timely notice of the intent to file this brief and emailed written consent to its filing. No counsel for any party authored this brief in whole or in part. No person or entity aside from amici, members of amicus ACLJ, or counsel for amici made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

At issue are two abortion regulations in Indiana. One sets requirements for the humane disposition of fetal remains. The other prohibits the abortion of a child when done for certain invidiously discriminatory reasons. The Seventh Circuit erred in ruling these provisions unconstitutional.

Amici wish to highlight two points. First, the Seventh Circuit ruled that, because this Court has held that preborn human beings are not "persons" under the Fourteenth Amendment, it is irrational for a state to treat their remains as human. This is not just a logical *non sequitur*, it is a notion that is profoundly unsettling to the many areas of law that treat unborn children as human beings.

Second, regarding the nondiscrimination provision, the Seventh Circuit's ruling disregards the important state interest in protecting expectant parents from the pressure caused by overly gloomy prenatal diagnoses – diagnoses that all too often prove inaccurate (the baby turns out healthy or only mildly disabled) or excessively pessimistic (the parents deeply love the child regardless of any disability).

This Court should grant review and reverse the judgment of the Seventh Circuit.

ARGUMENT

The Constitution does not compel states to treat the bodies of dead unborn children as just so much "medical trash." Pet. App. 121a (dissent from denial of en banc rehearing). Nor does the Constitution force states to allow abortion for any reason at all, no matter

how pernicious. The Seventh Circuit's contrary holding warrants this Court's review.

I. STATES CAN TREAT HUMAN REMAINS AS HUMAN REMAINS.

Concern for the proper disposition of human remains is ancient, indeed rooted in civilization itself. Burying the dead is a traditional obligation in Judaism,[2] a corporal work of mercy in the Christian tradition,[3] and a universal human value immortalized in the ancient Greek play, *Antigone*. To say that a state has *at the very least* a legitimate interest in seeing to the proper disposition of human remains is to understate the matter. States certainly have the authority to prohibit the "mindless dumping of aborted fetuses onto garbage piles," *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 451 (1983) (quoting state's asserted interest); *id.* at 474-75 (O'Connor, J., joined by White and Rehnquist, JJ.) (same).[4] *See also Franklin v. Fitzpatrick*, 428 U.S. 901 (1976) (summarily affirming three-judge district court ruling which, *inter alia*, rejected facial challenge to humane disposition statute). In this case Indiana has taken the straightforward step of, as the Seventh Circuit panel phrased it, "essentially requir[ing]

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[2]http://www.jewish-funeral-guide.com/tradition/jewish-burial-society.htm.

[3]http://www.newadvent.org/cathen/10198d.htm.

[4]The *Akron* Court did not reject the legitimacy of this interest, ruling instead that the particular provision at issue was unconstitutionally vague. *Id.* at 451.

abortion providers to dispose of aborted fetuses in the same manner as [other] human remains, as required under Indiana law." Pet. App. 15a. Since "aborted fetuses" are "human remains," this makes perfect sense.

The Seventh Circuit disagreed with this reasoning, perceiving a constitutional difficulty in any "recognition that aborted fetuses are human beings, distinct from other surgical byproducts, such as tissue or organs." *Id.* The panel did not cite any scientific basis for this objection, of course. After all, expectant mothers are not pregnant with "organs" or with some species other than *homo sapiens*. Instead, the Seventh Circuit, Pet. App. 15a-16a, pointed to this Court's ruling, in *Roe v. Wade*, 410 U.S. 113 (1973), that an unborn child is not a "person" within the meaning of that term in the Fourteenth Amendment. *Id.* at 156-58.[5] But to say that this holding controls all other areas of law is a profound *non sequitur*, as the dissents below noted. Pet. App. 41a (panel dissent), 123a (en banc dissent). Just as a corporation or a municipal entity can be or not be a "person" under the Fourteenth Amendment regardless of other laws, *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2769 (2014); *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978),

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[5] *Roe*'s conclusion on this point is questionable. The notion that "there could be 'human beings' who are not 'constitutional persons' is unfortunate," *Alexander v. Whitman*, 114 F.3d 1392, 1409 (3d Cir. 1997) (Alito, J., concurring). *See also* Joshua Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?* 40 Harv. J. Law & Pub. Pol'y 539 (2017); Amicus Brief of Catholics United for Life et al., *Planned Parenthood of SE Pa. v. Casey*, Nos. 91-744 & 91-902 (Apr. 6, 1992). But in any event, the proposition is unhelpful to the challengers here, as explained in the text.

unborn children can be persons for some legal purposes and not others. *E.g.*, David Kadar, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639, 657 (1980) ("*Roe v. Wade* neither prohibits nor compels consistency of interpretation of the meaning of 'person' as between the fourteenth amendment and wrongful death statutes"). Furthermore, if *Roe* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion," *Maher v. Roe*, 432 U.S. 464, 474 (1977), then surely *Roe* creates no limitation on a State's authority to value the humanity of what was once a living unborn child by regulating the disposition of that child's remains. Indeed, one does not even have to be a Fourteenth Amendment person at all to receive the protection of laws. As the *en banc* dissent observed, states regularly adopt animal welfare laws protecting non-persons and their remains. Pet. App. 123a.

The problem with the decision below, however, is not just a failure of logic. The Seventh Circuit's ruling calls into question a host of laws that treat unborn children as human beings, namely, laws that protect unborn babies from torts and crimes.[6] Are these statutes now on uncertain constitutional footing? The Seventh Circuit summarily brushed off such concerns:

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[6] *E.g.*, *Bolin v. Wingert*, 764 N.E.2d 201, 205 (Ind. 2001) (cataloguing various state rules governing recovery for wrongful death of unborn). The National Conference of State Legislatures lists 38 states as currently having fetal homicide laws. www.ncsl.org/research/health/fetal-homicide-state-laws.aspx. Federal law likewise protects prenatal children as human beings. 18 U.S.C. § 1841 (protection of unborn children).

> The State asks us to infer a legitimate interest by pointing to state and federal fetal homicide statutes, as well as state wrongful death statutes that treat non-viable fetuses as human beings. But these statutes seek to address a valid state interest in promoting respect for potential life. The fetal disposition provisions differ because there is no potential life at stake.

Pet. App. 16a. But this makes no sense. In every fetal homicide or wrongful death case, the unborn baby is *already dead*, and thus there is no more "potential life" to respect. Indeed, the same goes for the application of tort, criminal, and disposition of remains laws to *born* humans – after death, there is no life to save. It nevertheless makes sense to adopt laws governing the remains of those who *were once* living human beings. The deceased unborn belong to that category. To say otherwise would not just be biologically ignorant, but profoundly insensitive to all those who feel the pain and loss of a miscarriage.

The Seventh Circuit's decision thus injects a deep uncertainty into the constitutionality of a host of laws that treat unborn children as human beings.[7] This Court should grant review to dispel that uncertainty.

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[7] *Cf. Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986) (rejecting *Roe*-based challenge to wrongful death cause of action for unborn baby).

II. STATES HAVE A STRONG INTEREST IN COMBATING THE POTENTIALLY LETHAL PESSIMISM OF SOME PRENATAL FORECASTS.

The Seventh Circuit also invalidated an Indiana statute prohibiting abortion where the baby is aborted "solely because the fetus has been diagnosed with . . . any . . . disability". Pet. App. 132a-133a. The court below inferred that because *Roe* declared that a woman has a choice to abort a child when pregnant, she has a right to abort for any reason – including "that she does not want a particular child" for invidiously discriminatory reasons. Pet. App. 12a. Of course, *Roe* said no such thing. Nor does such a rule follow logically. There are plenty of things a person has a "right" to do (e.g., hiring or firing employees, refusing to sell property or goods, ignoring student questions), but not when that right is exercised in an invidiously discriminatory manner. States have a valid interest in combating such discrimination, especially where, as here, it has lethal consequences.

Amici wish to highlight an additional state interest supporting a ban on eugenic abortions: preventing the pressuring of vulnerable parents into irreversible decisions to abort their children.

Physicians face financial incentives to err on the side of doom and gloom. If they predict the worst, but things turn out well, everyone is relieved and there is no lawsuit. But if physicians don't foretell adverse consequences, and such consequences materialize, the physicians may face legal liability for failure to warn. This is particularly true in the context of pregnancy, since some jurisdictions recognize "wrongful birth" suits predicated upon the parents' having missed the

chance to abort a child who is then born with disabilities. *See* Note, *Rights Gone Wrong: A Case Against Wrongful Life*, 57 William & Mary L. Rev. 2329, 2332-36 (2016) (canvassing the states). In such jurisdictions, a physician worried about potential legal liability will be sure to note everything that might be wrong with the baby. There is no comparable financial counter-incentive.[8] As a consequence, prenatal diagnoses will tend to skew toward pessimism and put pressure on parents to go the abortion route.

There are serious moral and human rights problems associated with the idea of aborting a child because of that child's anticipated disability. Beyond that, however, Indiana can properly respond to at least two very worldly concerns: failure to anticipate the parental capacity to love children regardless of disabilities, and downright erroneous prenatal diagnoses.

Even parents who say they would have aborted had they known of their child's disabilities commonly profess great love for those same children. *See, e.g.*,

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[8] In theory there could be a counterbalancing "wrongful abortion" cause of action for those cases where the diagnosis of fetal disability is made negligently. *See* Ronen Perry & Yehuda Adar, *Wrongful Abortion: A Wrong in Search of a Remedy*, 5 Yale J. Health Pol'y, L., & Ethics 507 (2005). Problems of proof and causation, however, make such a cause of action challenging in practice, if not precluded in theory:

> To detect a wrongful abortion, a mother would have to suspect that the initial diagnosis was incorrect—which is not likely to be the case if a woman decides on an abortion precisely because of a genetic test or a doctor's advice—and to have access to some proof, also problematic considering the fetus is usually disposed of after the procedure.

Brandy Zadrozny, "Parents Sue Doctors Over 'Wrongful Abortion,'" *The Daily Beast* (Jan. 29, 2015).

Elizabeth Weil, "A Wrongful Birth?" *New York Times* (Mar. 12, 2006) ("the Brancas came to love A.J. deeply"); Elizabeth Picciuto, "Parents Sue for 'Wrongful Birth,'" *Daily Beast* (Aug. 17, 2014) ("It is indeed the case that they would have terminated the pregnancy. Now, however, they adore their daughter"); Aimee Green, "Jury awards nearly $3 million to Portland-area couple in 'wrongful birth' lawsuit against Legacy Health," *The Oregonian/OregonLive* (Mar. 9, 2012) ("his clients deeply love their daughter"). The grim prognosis a physician or genetic counselor offers a pregnant woman cannot possibly capture, and offer as a realistic counterweight, the genuine loving bond a mother or father later experiences. *See, e.g.*, Caitlin Keating, "'Miracle Baby' not Supposed to Live After Childbirth Celebrates Her First Birthday," *People* (Apr. 7, 2015) (parents of baby diagnosed with anencephaly decided to continue the pregnancy; "'Angela has made us better people . . . . I see life differently now. I only see love. I am a lucky mom'").

As for the diagnosis itself, there are countless instances in which parents were told a child would be born with severe disabilities, when in fact the child turned out to be either perfectly healthy or had only minor conditions. *See, e.g.*, Danielle Campoamor, "My Son was Misdiagnosed with Down Syndrome and it was Terrifying," *Romper* (Dec. 11, 2016) (baby misdiagnosed at 12 weeks with Down syndrome; son born perfectly healthy); Daniel P. Finney, "Meet 'Matthew the Great': The Iowa baby who defied a terminal diagnosis and lived," *Des Moines Register* (Aug. 27, 2018) (baby misdiagnosed at 23 weeks with terminal brain condition; baby was born with a manageable condition and may have no disabilities at

all); Micaiah Bilger, "Doctors Advised Her Parents to Abort Their Severely Disabled Baby, She's Born Healthy," *LifeNews.com* (May 11, 2016); Emma Innes, "'I was told to abort my healthy baby': Mother, 38, sues hospital after 'brain dead' son was born kicking and breathing," *Daily Mail* (Sept. 3, 2013). And these are only the cases where the parents chose *not* to abort; presumably many, many children die in abortion because they were inaccurately labeled as suffering from various conditions that did not actually exist.

Thus, aside from the interests Indiana identifies in its briefing, a ban on eugenic abortions furthers as well the legitimate interest in avoiding death from "excessive pessimism," i.e., failure to consider either parental capacity to love or the fallibility of prenatal diagnoses.

CONCLUSION

This Court should grant review and reverse the judgment of the Seventh Circuit.

Respectfully submitted,

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Nov. 15, 2018

APPENDIX

APPENDIX: List of individual amici parents

1. Sara Breeggemann
Baby L[redacted] (anencephaly)
North Carolina

2. Mike and Theresa Farnan
Baby A[redacted] (T21)
Pennsylvania

3. Brenda Lefever
Baby (T21)
Pennsylvania

4. Kristi Holden
Baby H[redacted] (T13)
Texas

5. Gina Schmittdiel
Baby G[redacted] (T21)
Minnesota

6. Renee Pierson
Baby T[redacted] (PUV)
North Carolina

7. Janina Arritola
Baby A[redacted] E[redacted] (T13)
Georgia

8. Katherine Brown
Baby G[redacted] (undetermined genetic condition)
South Carolina

9. Menzea and Sam Nielsen
Baby C[redacted] (T13)
Iowa

10. Teresa Werner
Baby M[redacted] (Spina bifida)

11. Denise & David Lane
Baby B[redacted] (T13)
Texas

12. Melissa and Taylor Blanton
Baby L[redacted] (CHD)
North Carolina

13. Roberta Wickman
Baby D[redacted] R[redacted] (T18)
Illinois

14. Katrina Roldan
Baby A[redacted] (T13)
California

15. Jennifer and Bob Babbitt
Baby S[redacted] and Baby S[redacted] (rare genetic syndrome)
Indiana

16. Mike and Denise Sanchez
Baby D[redacted] G[redacted] (suspected T21/born typical)
Texas

17. Jonathan and Rebecca Beckler.
Baby T[redacted] (Spina Bifida and Hydrocephalus)
Wisconsin

18. Eric and Amy Peterson
Baby E[redacted] J[redacted] (T13)
Massachusetts

19. Hannah and Simon Lemaire
Baby Z[redacted] (Meckel Gruber Syndrome)
Minnesota

20. Wanda Smith
Montana

21. Sarah Connors
Baby B[redacted] (Limb Body Wall Complex)
New York

22. Virginia Moore
Baby D[redacted] (fetal hydrops)

23. Anna Klein
Baby N[redacted] (T21)
Texas

24. Chris & Elizabeth Arendale
Baby J[redacted] J[redacted] (T13)
Washington

25. Chaeli Meerman
Baby J[redacted] H[redacted] (anencephaly)
Michigan

26. Amy Vawter
Baby M[redacted] (CHD)
Washington

27. Joy Keith
Baby C[redacted] (T18)
Ohio

28. Amy Horlander
Baby A[redacted] B[redacted] (undetermined genetic condition)
Indiana

29. Nathaniel and Tricia Stevens
Baby E[redacted] (encephalocele)
Wisconsin

30. Constance Bell-Merck
Baby B[redacted] A[redacted]
North Carolina

31. Julie and Jonathan Kersting
Baby G[redacted] (premature rupture of membranes)
Massachusetts

32. Heather Johnson
Baby [redacted] (T18)
Florida

33. Gennie Shelor
Baby A[redacted] (CHD)
North Carolina

34. Jason and Lauren Peetz
Baby J[redacted] (multiple anomalies)
North Carolina

35. Thomas & Elizabeth Warren
Baby A[redacted] & Baby B[redacted] (conjoined twins sharing a heart)
Delaware

36. Janet Onufer-Michael
Baby K[redacted] (Spina Bifida and Hydrocephalus)
New Jersey

37. Blake and Rebecca Fisher
Baby M[redacted] [redacted] (T18)
Florida

38. David & Frances Liberto
Baby M[redacted] (CHD)
North Carolina

39. Catherine and George Merovich
Baby A[redacted] F[redacted] (fetal hydrops)
Pennsylvania

40. Katie James
Baby E[redacted] (anencephaly)
North Carolina

41. Jodi B.
Baby G[redacted] (Noonan Syndrome)
Iowa

42. Melissa Powell
Baby A[redacted] (T13)
South Carolina

43. Britney Stout
Baby C[redacted] (Potter's Syndrome)
Ohio

44. Kristiana Donahue
Baby W[redacted] (rare genetic syndrome)
Indiana

No. 18-483

In the Supreme Court of the United States

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF AMERICANS UNITED FOR LIFE AND CHARLOTTE LOZIER INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Americans United for Life (AUL) is the nation's oldest and most active pro-life non-profit advocacy organization. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death. AUL attorneys are highly-regarded experts on the Constitution and pro-life policy, and are often consulted on various bills and amendments across the country. AUL has created comprehensive model legislation and works extensively with state legislators to enact constitutional pro-life laws, including a human fetal remains model bill that ensures a proper and respectful final disposition. See Ams. United for Life, DEFENDING LIFE 290–301 (2018 ed.) (state policy guide providing model bill that requires unborn humans to be treated with dignity and respect).

Charlotte Lozier Institute (CLI) is the education and research arm of the Susan B. Anthony List. Named after a nineteenth century feminist physician who, like Susan B. Anthony, championed women's rights without sacrificing either equal opportunity or the lives of the unborn, CLI studies federal and state policies and their impact on women's health and on child and family well-being. CLI is

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1 No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice and have consented to the filing of this brief.

committed to bringing the power of science, medicine, and research to law and public policy. It has continued to provide scientific information on fetal research, fetal disposition, and related bioethical issues to members of Congress and their staff, state legislators, and media entities. Since 2015, CLI scholars and staff have published research and given legislative testimony regarding the disposition of fetal remains in Indiana and across the nation.

SUMMARY OF ARGUMENT

Without regulations, medical practitioners are free to dispose of human fetal remains by incineration with medical waste, by dumping in landfills, and even by burning the remains to generate energy. In response to reports that human fetal remains were being disposed of in inhumane ways such as these, Indiana passed House Enrolled Act 1337, which included a fetal disposition provision requiring the humane and dignified disposition of human fetal remains. This provision recognized the simple biological fact that human fetuses are human beings—a fact that is consistently recognized in federal and state laws, as well as by this Court and other courts.

Despite the rationality of treating human fetal remains humanely and with dignity, the Seventh Circuit—in conflict with the Eighth Circuit—found that there was no rational reason for Indiana to do so. Without intervention by this Court, Indiana will be unable to stop the inhumane disposition of human fetal remains within its borders. And without clarification on whether or not these laws are

constitutional, other states that want to require the humane and dignified disposition of human fetal remains are left in limbo. As such, this Court should grant Indiana's petition.

ARGUMENT

The Supreme Court should grant certiorari to determine a nationally important question: Whether the Constitution prohibits states from requiring the humane and dignified disposition of human fetal remains.

A. Human fetuses are human.

1. Human fetuses are unborn human beings, who are unique and separate from their mother.

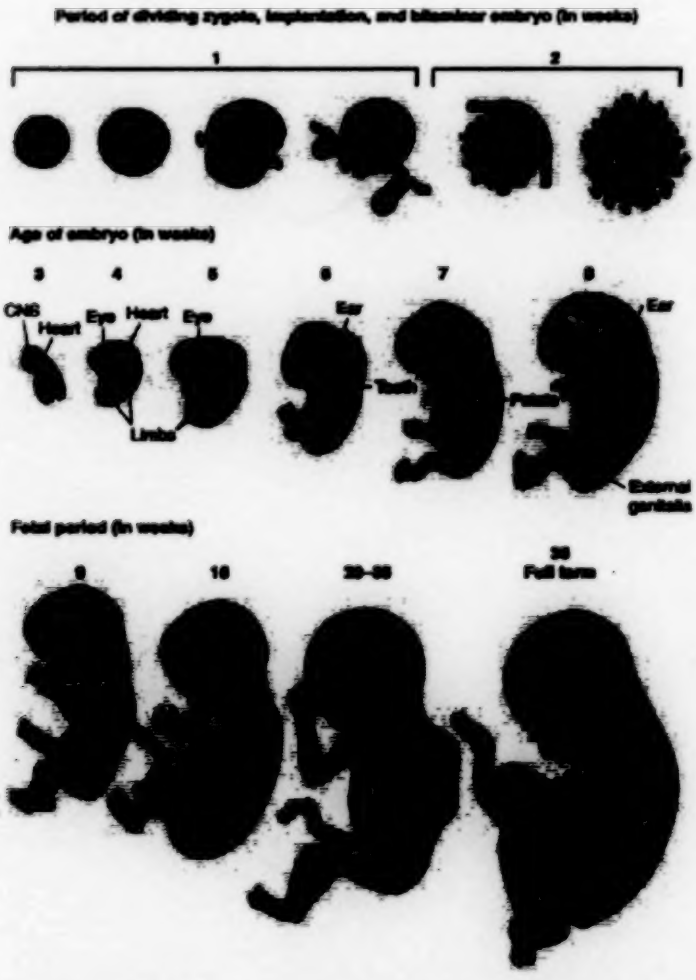
After conception and prior to birth, mammals go through two major stages of development: embryo and fetus. An "embryo" is the "young of any organism in an early stage of development," while a "fetus" is "an unborn animal in its later stages of development." *Embryo*, TABER'S CYCLOPEDIC MEDICAL DICTIONARY 783 (23d ed. 2017); *Fetus*, TABER'S CYCLOPEDIC MEDICAL DICTIONARY 911.

For humans, "[t]he embryo and the fetus are the two primary names given to the unborn human during gestation." Clarke D. Forsythe, *Legal Perspectives on Cloning: Human Cloning and the Constitution*, 32 Val. U. L. Rev. 469, 474 (1998). "Embryo" is "the stage of prenatal development from the time of fertilization of

the ovum (conception) until the end of the eighth week." *Embryo*, MOSBY'S MEDICAL DICTIONARY 605 (10th ed. 2017). The embryonic period is "characterized by rapid growth, differentiation of the major organ systems, and development of the main external features." *Id.* A "fetus" is "the human being in utero after the embryonic period and the beginning of the development of the major structural features, from the ninth week after fertilization until birth." *Fetus*, MOSBY'S MEDICAL DICTIONARY 690. The graphic on the next page shows the stages of development of an unborn human from embryo to fetus. See *Stages of Development of Human Embryo Including Mature Fetus*, TABER'S CYCLOPEDIC MEDICAL DICTIONARY 784.

Indiana's fetal disposition provision uses "fetus" as shorthand for all stages of development of an unborn human (embryo and fetus), and defines "fetus" as "an unborn child, irrespective of gestational age or the duration of the pregnancy." Ind. Code § 16-18-2-128.7. For the remainder of this brief, all references to "fetus" mirror Indiana's broader statutory definition.

Fetuses by definition are not egg, sperm, or mere tissue; they are unborn human beings. See *Fetus*, TABER'S CYCLOPEDIC MEDICAL DICTIONARY 911 (defining "fetus" as "an *unborn human*"); Forsythe, 32 Val. U.L. Rev. at 477 ("[T]he one-celled human embryo is not simply 'human life' but a human being."). "A human being is simply a member of the species homo sapiens, and it is defined biologically, by species, not developmentally." Forsythe, 32 Val. U.L. Rev. at 478. Although unborn humans develop in their mother's womb and are dependent on their mother for survival,



STAGES OF DEVELOPMENT OF HUMAN EMBRYO INCLUDING MATURE FETUS

they are separate and unique human beings from their mother. An unborn human has unique DNA that is distinct from his or her mother (and father). See *id.* at 475, 477. A male unborn human is a different sex from his pregnant mother, a female. An unborn

human conceived by parents of different races is a combination of his or her parents' races and thus a different racial composition from his or her mother (and father). In sum, unborn humans are unique and separate human beings from their mother.

2. Federal and state laws recognize the humanity of unborn humans.

Federal and state laws, both inside and outside of the abortion context, recognize the humanity of unborn humans. For example, federal and state laws define unborn humans as human beings. The federal Unborn Victims of Violence Act defines "unborn child" as a "child in utero," which means "a member of the species homo sapiens, at any stage of development, who is carried in the womb." 18 U.S.C. § 1841(d). Many state laws either mirror this definition or adopt a version of their own.[2]

Outside the context of a legal abortion, federal and state laws criminalize and provide remedies for killing an unborn human. The Unborn Victims of Violence Act makes it a federal crime to kill or cause bodily injury to an unborn human in utero. 18 U.S.C. § 1841(a)(1). Thirty-eight states currently treat the killing of an unborn human as homicide, with at least

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2 See, *e.g.*, Alaska Stat. § 11.81.900(b)(64); Ark. Code Ann. § 5-1-102(13); Fl. Stat. § 775.021(5); Ga. Code Ann. § 52-7-12.3(a); 720 Ill. Comp. Stat. § 5/9-2.1(d); Kan. Stat. Ann. § 21-5419; Ky. Rev. Stat. Ann. § 507A.010; La. Rev. Stat. Ann. §§ 14:2(7), (11); Minn. Stat. § 145.4241; Miss. Code Ann. § 97-3-37; N.C. Gen. Stat. § 14-23.1; Okla. Stat. tit. 21, § 691; S.C. Code Ann. § 16-3-1083; Wis. Stat. § 939.75(1).

twenty-eight of those states criminalizing the act from conception.[3] Nearly all fifty states, as well as the District of Columbia, have wrongful death statues, allowing recovery for the death of an unborn human or the subsequent death of an infant born alive who was injured while in utero.[4]

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3 See, *e.g.*, Ala. Code § 13A-6-1; Alaska Stat. § 11.41.150; Ariz. Rev. Stat. Ann. § 13-1102; Ark. Code Ann. § 5-1-102(13); Cal. Penal Code § 187(a); Fla. Stat. § 775.021(5); Ga. Code Ann. § 16-5-80; Idaho Code Ann. § 18-4001; 720 Ill. Comp. Stat. 5/9-1.2; Ind. Code § 35-42-1-1; Kan. Stat. Ann. § 21-5419; Ky. Rev. Stat. Ann. § 507A.020; La. Rev. Stat. Ann. § 14:32.5; Md. Code Ann., Crim. Law § 2-103; Mass. Gen. Laws ch. 90, § 24G (as interpreted by *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984)); Mich. Comp. Laws § 750.322; Minn. Stat. § 609.2114; Miss. Code Ann. § 97-3-19; Mo. Rev. Stat. § 565.020 (as defined by *id.* § 1.205); Mont. Code Ann. § 45-5-102; Neb. Rev. Stat. § 28-389; Nev. Rev. Stat. § 200.210; N.H. Rev. Stat. Ann. § 630:1-a; N.C. Gen. Stat. § 14-23.2; N.D. Cent. Code § 12.1-17.1-02; Ohio Rev. Code Ann. § 2903.01; Okla. Stat. tit. 21, § 691; 18 Pa. Cons. Stat. § 106; R.I. Gen. Laws § 11-23-5; S.C. Code Ann. § 16-3-1083; S.D. Codified Laws § 22-16-1.1; Tenn. Code Ann. § 39-13-214; Tex. Penal Code Ann. § 19.02 (as defined by *id.* § 1.07); Utah Code Ann. § 76-5-201; Va. Code Ann. § 18.2-32.2; Wash. Rev. Code § 9A.32.060; W. Va. Code § 61-2-30; Wis. Stat. § 940.04.

4 See, *e.g.*, Ala. Code § 6-5-410 (as interpreted by *Mack v. Carmack*, 79 So.3d 597 (Ala. 2011)); Alaska Stat. § 09.55.585; Ariz. Rev. Stat. Ann. § 12-611 (as interpreted by *Summerfield v. Superior Court*, 698 P.2d 712 (Ariz. 1985)); Ark. Code Ann. § 16-62-102; Colo. Rev. Stat. § 13-21-202 (as interpreted by *Espadero v. Feld*, 649 F. Supp. 1480 (D. Colo. 1986)); Conn. Gen. Stat. § 52-555 (as interpreted by *Florence v. Town of Plainfield*, 849 A.2d 7 (Conn. Super. Ct. 2004)); Del. Code Ann. tit. 10, § 3724 (as interpreted by *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557 (Del. Super. Ct. 1956)); D.C. Code § 12-101 (as interpreted by *Greater Se. Cmty. Hosp. v. Williams*, 482 A.2d 394 (D.C. 1984)); Fla. Stat. § 768.19 (as interpreted by *Stern v. Miller*, 348 So.2d 303 (Fla. 1977)); Ga. Code Ann. § 19-7-1 (as interpreted by *Porter*

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v. Lassiter, 87 S.E.2d 100 (Ga. Ct. App. 1955)); Haw. Rev. Stat. § 663-3 (as interpreted by *Wade v. United States*, 745 F. Supp. 1573 (Dist. Haw. 1990)); Idaho Code Ann. § 5-310 (as interpreted by *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982)); 740 Ill. Comp. Stat. § 180/2 (as interpreted by *Chrisafogeorgis v. Brandenberg*, 304 N.E.2d 88 (Ill. 1973)); Ind. Code § 34-23-2-1; Kan. Stat. Ann. § 60-1901; Ky. Rev. Stat. Ann. § 411.130 (as interpreted by *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955)); La. Civ. Code Ann. art. 2315.2 (as defined by *id.* art. 26); Me. Rev. Stat. tit. 18-A, § 2-804; (as interpreted by *Milton v. Cary Med. Ctr.*, 538 A.2d 252 (Me. 1988)); Md. Code Ann., Cts. & Jud. Proc. § 3-904 (as interpreted by *State ex. rel. Odham v. Sherman*, 198 A.2d 71 (Md. 1964)); Mass. Gen. Laws ch. 229, § 2 (as interpreted by *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1975)); Mich. Comp. Laws § 600.2922a; Minn. Stat. § 573.02 (as interpreted by *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949)); Miss. Code Ann. § 11-7-13; Mo. Rev. Stat. § 537.080 (as defined by *id.* § 1.205.2); Mont. Code Ann. § 27-1-513 (as interpreted by *Strzelczyk v. Jett*, 870 P.2d 730 (Mont. 1994)); Neb. Rev. Stat. § 30-809; Nev. Rev. Stat. § 41.085 (as interpreted by *White v. Yup*, 485 P.2d 617 (Nev. 1969)); N.H. Rev. Stat. Ann. § 556:7 (as interpreted by *Poliquin v. MacDonald*, 135 A.2d 249 (N.H. 1957)); N.J. Stat. Ann. § 2A:31-1 (as interpreted by *Graf v. Taggert*, 204 A.2d 140 (N.J. 1964)); N.M. Stat. Ann. § 41-2-1 (as interpreted by *Salazar v. St. Vincent Hosp.*, 619 P.2d 826 (N.M. 1980)); N.C. Gen. Stat. § 28A-18-2 (as interpreted by *DiDonato v. Wortman*, 358 S.E.2d 489 (N.C. 1987)); N.D. Cent. Code § 32-21-01 (as defined by *id.* § 14-10-15); Ohio Rev. Code Ann. § 2125.01 (as interpreted by *Werling v. Sandy*, 476 N.E.2d 1053 (Ohio 1985)); Okla. Stat. tit. 12, § 1053; Or. Rev. Stat. § 30.020 (as interpreted by *Libbee v. Permanente Clinic*, 518 P.2d 636 (Or. 1974)); 42 Pa. Const. Stat. § 8301 (as interpreted by *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985)); R.I. Gen. Laws § 10-7-1 (as interpreted by *Presley v. Newport Hosp.*, 365 A.2d 748 (R.I. 1976)); S.C. Code Ann. § 15-51-10 (as interpreted by *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964)); S.D. Codified Laws § 21-5-1; Tenn. Code Ann. § 20-5-106; Tex. Civ. Prac. & Rem. Code Ann. §§ 71.001, 71.002; Vt. Stat. Ann. tit. 14, §§ 1491, 1492 (as interpreted by *Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc.*, 425

In addition to criminal laws, states have increasingly afforded unborn humans the protections of the law and recognized unborn humans as "persons" with legally enforceable rights in the areas of tort law, guardianship law, healthcare law, property law, and family law. See *Phillips v. State*, No. 1160403, slip op. at 149, 158–76 (Ala. Oct. 19, 2018) (Parker, J., concurring specially) (surveying state laws demonstrating that "unborn children have numerous rights that all people enjoy").[5]

Even in the context of abortion, federal and state laws still recognize the humanity of unborn humans. In 2002, Congress passed the Born-Alive Infant Protection Act, guaranteeing legal protections as a "person" under federal law to all infants born alive, including those who survive an abortion procedure. 1 U.S.C. § 8. In 2003, Congress passed the Partial-Birth Abortion Ban Act, making it a federal crime to perform the gruesome and inhumane partial-birth abortion procedure. 18 U.S.C. § 1531; accord *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act as constitutional). In addition, several states, including Petitioner Indiana, have informed consent laws for abortion that recognize the

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A.2d 92 (Vt. 1980)); Va. Code Ann. § 8.01-50; Wash. Rev. Code § 4.24.010 (as interpreted by *Moen v. Hanson*, 537 P.2d 266 (Wash. 1975)); W. Va. Code § 55-7-5 (as interpreted by *Baldwin v. Butcher*, 184 S.E.2d 428 (W. Va. 1971)); Wis. Stat. § 895.03 (as interpreted by *Kwaterski v. State Farm Mut. Auto Ins. Co.*, 148 N.W.2d 107 (Wis. 1967)).

5 *Available at* http://acis.alabama.gov/displaydocs.cfm?no=906161&event=5BM0OIZOW.

humanity of an unborn human.[6] For example, several states require the abortion provider to inform a woman seeking an abortion that the abortion "terminate[s] the life of a whole, separate, unique, living human being."[7]

Mirroring federal and state laws that prohibit the selling of human organs and prevent the premeditated commodification of human body parts, the federal government and many states have laws specifically prohibiting the sale and purchase of human fetal remains.[8] As further discussed in *infra* Section B.2, many states also require the humane disposition of aborted (and miscarried) human fetal remains.[9]

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6 See Ind. Code § 16-34-2-1.1 (Women seeking an abortion must be informed that "human physical life begins when a human ovum is fertilized by a human sperm.").

7 See Kan. Stat. Ann. § 65-6709; N.D. Cent. Code § 14-02.1-02; Okla. Stat. tit. 63, § 1-738.3; S.D. Codified Laws § 34-23A-10.1; see also Mo. Rev. Stat. § 188.027 (Abortion "terminate[s] the life of a separate, unique, living human being.").

8 See, *e.g.*, 42 U.S.C. § 289g-2; Ala. Code § 26-23F-5; Ariz. Rev. Stat. Ann. § 36-2302; Ark. Code Ann. § 20-17-802; Colo. Rev. Stat. § 25-2-111.5; Fla. Stat. § 873.05; Idaho Code Ann. § 39-9306; 410 Ill. Comp. Stat. 110/45; Ind. Code § 35-46-5-1.5; Kan. Stat. Ann. § 65-67a06; Ky. Rev. Stat. Ann. § 436.026; La. Rev. Stat. Ann. § 14:87.3; Me. Rev. Stat. tit. 22, § 1593; Mass. Gen. Laws ch. 112, § 12J; Mo. Rev. Stat. § 188.036; Neb. Rev. Stat. § 28-342; N.M. Stat. Ann. § 24-9A-5; N.C. Gen. Stat. § 14-46.1; N.D. Cent. Code § 14-02.2-02; Ohio Rev. Code Ann. § 2919.14; Okla. Stat. tit. 63, § 1-735; 18 Pa. Cons. Stat. § 3216; R.I. Gen. Laws § 11-54-1; S.D. Codified Laws § 34-23A-17; Tenn. Code Ann. § 39-15-208; Tex. Penal Code Ann. § 48.03; Utah Code Ann. § 76-7-311; Wyo. Stat. Ann. § 35-6-115.

9 See, *e.g.*, Ala. Code § 26-23F-4; Ark. Code Ann. § 20-17-801; Idaho Code Ann. § 39-9304; La. Rev. Stat. Ann. § 40:1191.2; N.C.

3. This Court and other courts have recognized the humanity of unborn humans.

In the context of abortion, this Court has repeatedly recognized the humanity of the unborn. In *Roe v. Wade*, this Court acknowledged that at the point of viability, a human fetus "has the capability of meaningful life outside the mother's womb." 410 U.S. 113, 163 (1973). And in *Gonzales*, this Court acknowledged that the federal Partial-Birth Abortion Ban Act "expresses respect for the dignity of human life," and affirmed Congress' intent to protect "all vulnerable and innocent human life." 550 U.S. at 157. As this Court explained, "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *id.* at 147.

Many other courts have also recognized the humanity of unborn humans. For instance, in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, the *en banc* Eighth Circuit rejected Planned Parenthood's challenge to South Dakota's provision on informed consent for abortion, which included a required disclosure that: (1) "the abortion will terminate the life of a whole, separate, unique, living human being"; (2) the mother "has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South

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Gen. Stat. § 130A-131.10; N.D. Cent. Code § 14-02.1-09; Ohio Admin. Code § 3701-47-05; Okla. Stat. tit. 63, § 1-301(10); Tex. Health & Safety Code Ann. § 697.004.

Dakota"; and (3) "by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated." S.D. Codified Laws § 34-23A-10.1(1)(b)–(d). A separate section defined "human being" as "an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation." *Id.* § 34-23A-1(4). The *en banc* court explained that the disclosure was not ideological, "untruthful, misleading or [ir]relevant to the decision to have an abortion." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2008) (en banc); accord *Planned Parenthood of Ind., Inc. v. Comm'r, Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 914 (S.D. Ind. 2011) (finding that the phrase "human physical life begins when a human ovum is fertilized by a human sperm" is an accurate, non-misleading biological fact).

4. The humanity of an unborn human is a different question from "personhood" under the Fourteenth Amendment.

The Seventh Circuit panel erroneously conflated the humanity of a human fetus with its legal status as a "person" for purposes of the Fourteenth Amendment. See *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health* (*PPINK*), 888 F.3d 300, 308 (7th Cir. 2018). The court of appeals assumed that Indiana cannot have a legitimate interest in the humane and dignified disposition of human fetal remains *unless* the human fetus is legally recognized as a "person" under the Fourteenth

Amendment. *Id.* But the Fourteenth Amendment is not the arbiter of humanity, nor does it confer dignity. Humanity and dignity are inherent in being human, whether alive or dead. A human fetus is a human being (and legally recognized as a "person" for many purposes under state law), whether or not he or she is legally considered a "person" for purposes of the Fourteenth Amendment. See Forsythe, 32 Val. U.L. Rev. at 478 ("Human being is an anthropological term that is based on biology and species, whereas 'person' is a moral or philosophical term."). Thus, this Court need not reach the issue of "personhood" under the Fourteenth Amendment to agree that human fetuses are human beings and find that Indiana has a legitimate state interest in the humane and dignified disposition of human fetal remains.

B. It is constitutional and rational to require the humane and dignified disposition of human fetal remains.

1. Although human fetal remains can be disposed of humanely, they are often treated inhumanely.

How human fetal remains can and should be disposed of is an important national question. With at least 926,200 abortions each year in the United States (not to mention fetal deaths from miscarriages), medical practitioners need to dispose of the remains of approximately 2,538 unborn humans every day.[10]

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10 The most recent data available is for the year 2014. See Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service*

There are three main ways to dispose of human fetal remains: burial, cremation (or interment), and incineration as medical waste. Cremation and incineration are similar except the former means "[t]o reduce a dead body to ash by burning," *Cremate*, TABER'S CYCLOPEDIC MEDICAL DICTIONARY 580, while the latter means "the removal or reduction of waste materials by burning." *Incineration*, MOSBY'S MEDICAL DICTIONARY 913. It is considered inhumane to incinerate a human body, especially when incinerated together with medical waste. Even more inhumanely, human fetal remains have been dumped in landfills and burned to generate electricity.[11]

Availability in the United States, 2014, 49 Perspectives on Sexual & Reprod. Health 17, (2017), https://doi.org/10.1363/psrh.12015; see also Tara C. Jatlaoui et al., *Abortion Surveillance—United States, 2014*, CDC (Nov. 24, 2017), https://www.cdc.gov/mmwr/volumes/66/ss/ss6624a1.htm?s_cid=ss6624a1_w (Based on voluntary reporting by states, the U.S. Center for Disease Control and Prevention reported that in 2014 there were at least 652,639 abortions.).

11 See, *e.g.*, Jeremy Pelzer, *Aborted Fetal Remains from Ohio Planned Parenthood Ended Up in Landfills, Incinerators, Attorney General Says*, Cleveland.com (Dec. 11, 2015, 12:16 PM), http://www.cleveland.com/open/index.ssf/2015/12/aborted_fetal_remains_from_ohi.html; Katie Pavlich, *Horrifying: Bodies of Aborted Babies Burned to Power Homes in Oregon*, Townhall (Apr. 24, 2014, 8:21 AM), http://townhall.com/tipsheet/katiepavlich/2014/04/24/horrifying-bodies-of-aborted-babies-burned-to-power-homes-in-oregon-n1828680; AP, *2 Texas Abortion Clinics Fined for Fetus Disposal*, My San Antonio (Feb. 11, 2012, 8:35 PM), http://www.mysanantonio.com/news/local_news/article/2-Texas-abortion-clinics-fined-for-fetus-disposal-3305551.php.

2. To avoid treating human fetal remains inhumanely, Indiana and other states require the humane disposition of human fetal remains.

Indiana's fetal disposition provision was proposed in the wake of and in response to reports of the inhumane ways human fetal remains were being disposed of. The legislator who sponsored the bill, Indiana State Senator Todd Young, did so because an Indiana waste company in his district accepted out-of-state aborted human fetal remains in violation of its permit. The waste company would treat infectious waste, including human fetal remains, with microwaves and steam before transporting it to its final disposal facility where the company would grind up the "waste" and dump it into a landfill. While that waste company was ultimately fined $11,250 for violating its permit, there was no law prohibiting four other Indiana waste companies from disposing of human fetal remains—from within the state or outside of the state—in similar, inhumane manners.[12]

Indiana's fetal disposition provision addressed the health, safety, and moral concerns over how to properly dispose of human fetal remains, regardless of whether the death resulted from a miscarriage or an

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12 See Agreed Order at 2, 3, *Comm'r, Dep't of Ind. Envtl. Mgmt. v. MedAssure of Ind. LLC*, No. 2016-23569-S (Ind. Dep't of Envtl. Mgmt. Feb. 2, 2016), http://www.irtl.org/wp-content/uploads/2010/06/MedAssure-PAO-2-9-16.pdf; Senate Chamber Session Video at 3:43:30–3:48:35, 2016 Archived Video, Ind. General Assembly (Mar. 1, 2018), http://iga.in.gov/information/archives/2016/video/senate/.

abortion. The Indiana legislature found that the provision was necessary to ensure that human beings—albeit unborn—are treated humanely and with dignity.

Indiana specifies that both "infectious waste" and "pathological waste" do "not include an aborted fetus or a miscarried fetus." Ind. Code §§ 16-41-16-4, 16-41-16-5. An abortion clinic or health care facility that has possession of an aborted or miscarried fetus "shall provide for the final disposition" of the fetus. *Id.* §§ 16-21-11-6, 16-34-3-4. In recognition of practical and privacy concerns, Indiana clarifies that the mother of an aborted fetus "has the right to determine the final disposition of the aborted fetus," *id.* § 16-34-3-2(a), and allows aborted fetuses to be "cremated by simultaneous cremation." *Id.* § 16-34-3-4; see also *id.* § 16-21-11-4 (allowing the parent or parents of a miscarried fetus to determine the final disposition of the remains); *id.* § 16-21-11-6 (allowing the simultaneous cremation of miscarried fetuses).

Indiana is not alone. Most states regulate the disposition of human fetal remains, and many explicitly require the humane disposition of human fetal remains, including Alabama, Arkansas, Idaho, Louisiana, North Carolina, North Dakota, Ohio, Oklahoma, and Texas. See *supra* note 9. However, the constitutionality of these state laws, as well as any future state fetal disposition laws, is now in limbo due to the Seventh Circuit's ruling below. Clear guidance is needed from the Supreme Court to clarify whether such laws are permissible health, safety, and moral state regulations.

3. Unlike the Seventh Circuit, this Court and the Eighth Circuit have recognized that states have a legitimate interest in the proper disposition of human fetal remains.

This Court has recognized that the "proper disposal of fetal remains" is a legitimate government interest. See *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 452 n.45 (1983) ("Akron remains free, of course, to enact more carefully drawn regulations that further its *legitimate interest in proper disposal of fetal remains*." (emphasis added)), *overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). In *Akron*, this Court addressed whether Akron, Ohio could require physicians performing abortions to ensure that fetal remains were disposed of in a "humane and sanitary manner." *Id.* at 451–52. Ultimately, the Court found that the law violated the Due Process Clause because the undefined phrase "humane and sanitary," coupled with the imposition of criminal liability, failed to give a physician "fair notice that his contemplated conduct [wa]s forbidden." *Id.*; but see *id.* at 474–75 (O'Connor, White, Rehnquist, J.J., dissenting) (disagreeing that the provision was vague).

After *Akron*, the Eighth Circuit addressed the constitutionality of a Minnesota law regulating the disposal of human fetal remains by hospitals, clinics, and medical facilities within the state. See *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). The court recognized that "*Akron* makes clear that more carefully drawn regulations

might suffice to 'further [the government's] legitimate interest in proper disposal of fetal remains.'" *Id.* at 482 (alteration in original) (quoting *Akron*, 462 U.S. at 452 n.45). And unlike *Akron*'s fetal disposition law, Minnesota's fetal disposition law was "sufficiently clear to avoid vagueness concerns." *Id.* at 484.

Since the *Akron* Court recognized "the legitimate interest of states and municipalities in regulating the disposal of fetal remains from abortions and miscarriages," *id.* at 481 (citing *Akron*, 462 U.S. at 451–52 nn.44–5), the Eighth Circuit concluded that Minnesota's law was reasonably related to the state's legitimate interest in protecting "public sensibilities." *Id.* at 488. The Minnesota legislature's decision to draw the line at regulating abortions and miscarriages at home was not enough to invalidate the state's interest, especially given "the privacy concerns implicit in activity in one's home." *Id.*

In contrast to both this Court and the Eighth Circuit, the Seventh Circuit panel refused to find that Indiana had a legitimate state interest in the proper and humane disposition of human fetal remains. See *PPINK*, 888 F.3d at 308–09. And unlike the Eighth Circuit, the Seventh Circuit failed to recognize the rational reasons for regulating medical practitioners, but not women in their homes. See *id.* at 309 (finding that, even if Indiana had a legitimate state interest, Indiana's fetal disposition provision was not rationally related to its interest, in part, because the provision allows a woman to dispose of her child's fetal remains in whatever manner she wishes). This

conflict between the Seventh and Eighth Circuits can only be resolved by this Court.

4. A state's legitimate interest in the humane and dignified disposition of human fetal remains does not conflict with *Roe* or *Casey*.

This Court has consistently recognized a state's interest in unborn human fetal life. In *Roe*, this Court recognized that states have an "important and legitimate interest in potential life." 410 U.S. at 163. In *Casey*, this Court rejected *Roe*'s trimester framework because it "undervalue[d] the State's interest in potential life." 505 U.S. at 873. In *Stenberg v. Carhart*, this Court again recognized the state's interest "to ensure respect for all human life and its potential." 530 U.S. 914, 957 (2000) (citing *Casey*, 505 U.S. at 871). The *Stenberg* Court explained that "*Casey*'s assurance that the State's constitutional position in the realm of promoting respect for life is more than marginal." *Id.* at 964. And in *Gonzales*, the Court further emphasized:

> The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. . . . Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power . . . in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, *including life of the unborn*.

550 U.S. at 157–58 (emphasis added).

The state has "important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." *Roe*, 410 U.S. at 154. Regarding the regulation of medical practitioners, states have a legitimate interest and play a significant role in "protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997); see also *Barsky v. Bd. of Regents*, 347 U.S. 442, 451 (1954) (indicating the state has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine). This includes a medical practitioner's disposition of human fetal remains within his or her possession. Cf. *Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting) ("States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus."); *id.* at 979 (Kennedy, J., dissenting) (It is also legitimate to affirm "that medical procedures must be governed by moral principles having their foundation in the intrinsic value of human life, including life of the unborn.").

Regulating the disposition of human fetal remains does not conflict with *Roe* or *Casey*. As the Eighth Circuit explained, Minnesota's human fetal disposition law "does not burden the abortion choice," because the regulation had "no significant impact" on a woman's exercise of her choice. *Minnesota*, 910 F.2d at 486. "Rather than regulating abortion, [a human

fetal disposition] statute acknowledges the existence of abortion and regulates an issue related to abortion." *Id.* at 487. While a human fetal disposition law admittedly touches on abortion, it does not interfere with or burden a woman's abortion choice, which by definition has already been made at the time of fetal disposition. See *id.* The Eighth Circuit also rejected Planned Parenthood's arguments that the increased cost from disposing of fetuses and the alleged associated psychological trauma created an undue burden on a woman's abortion decision. *Id.* at 487. Notably, in this case, Planned Parenthood conceded that Indiana's fetal disposition provision does not interfere with a fundamental right. See *PPINK*, 888 F.3d at 307. In short, requiring the humane disposition of human fetal remains does not conflict with *Roe* or *Casey* because it does not burden a woman's abortion choice.

5. It is rational for Indiana to require the humane and dignified disposition of human fetal remains.

It was rational for the Indiana legislature to decide that it wanted to ensure that human fetal remains are disposed of humanely and with dignity. According to scientific and medical definitions, and as recognized by federal and state governments, as well as this Court and other courts, human fetuses are human beings—albeit unborn human beings in early stages of development. As human beings, human fetuses are worthy of being treated humanely and with dignity, whether in life or in death. Laws requiring the

humane and dignified disposition of human fetal remains are a natural extension of this fact.

It is rational to treat the disposition of human fetal remains consistently with other federal and state laws that recognize the humanity (and even personhood) of an unborn human. For instance, if a state can apply the same penalty to the unlawful killing of an unborn human that is applied to the killing of his or her mother, then it is certainly rational for a state to require that the unborn human's remains receive the same humane and dignified treatment as his or her mother's remains.

It is rational to regulate the proper disposition of human fetal remains by medical practitioners as an exercise of a state's legitimate interests in the life of the unborn and the regulation of the medical profession, as recognized by this Court and other courts.

It is rational to regulate fetal remains in the possession of medical practitioners, but not in the possession of the mother. It is rational to take into consideration competing, and possibly contradicting, practical and logistical concerns when crafting a law.

Indiana's fetal disposition provision rationally addresses the health, safety, and moral concerns over how to properly dispose of human fetal remains by medical practitioners—regardless of whether the death is a result of a miscarriage or an abortion. The Seventh Circuit panel incorrectly assumed that the "exceptions" to Indiana's fetal disposition provision

disprove Indiana's legitimate state interest. See *PPINK*, 888 F.3d at 309. But the lines Indiana drew are rational given the other competing, and potentially conflicting, interests Indiana had to balance. The constitutional standard is not whether the law is comprehensive, but whether it is a rational exercise of a legitimate state interest. See *Gonzales*, 550 U.S. at 157–58. Indiana's fetal disposition provision clearly is.

C. Without intervention by this Court, Indiana and other states will be unable to require the humane disposition of human fetal remains.

Without intervention by this Court, Indiana will be unable to stop the inhumane disposition of human fetal remains within its borders. With the existing conflict in the circuit courts, some states, like Minnesota in the Eighth Circuit, are able to enforce fetal disposition laws while others, like Indiana in the Seventh Circuit, are not. Without clarification by this Court, other states will be left wondering whether or not the Constitution allows them to ensure that the disposition of human fetal remains is done humanely and with dignity.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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No. 18-483

IN THE

Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA DEPARTMENT OF HEALTH, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a State may require health care facilities to dispose of fetal remains in the same manner as other human remains, *i.e.*, by burial or cremation.

2. Whether a State may prohibit abortions motivated solely by the race, sex, or disability of the fetus and require abortion doctors to inform patients of the prohibition.

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1943, *amicus curiae* Association of American Physicians & Surgeons ("AAPS") is a non-profit membership corporation of physicians who practice in nearly every specialty and state. AAPS defends the practice of private, ethical medicine, and works to preserve the sanctity of the patient-physician

[1] *Amicus* AAPS files this brief after providing the requisite ten days' prior written notice and receiving written consent by all the parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

relationship. The Supreme Court has made use of *amicus* briefs submitted by AAPS in high-profile cases. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The U.S. Court of Appeals for the Third Circuit also cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006).

AAPS, as a physician's organization that has been active for 75 years, has a direct and vital interest in defending the integrity of the medical profession and the ethics of the Oath of Hippocrates. AAPS has long advocated for strict adherence to the U.S. Constitution, which is at issue in this case.

SUMMARY OF ARGUMENT

The Constitution does not forbid States from classifying abortive remains as human remains, as the Indiana statute does. Yet the Seventh Circuit disagreed with the Eighth Circuit and the Constitution itself in holding otherwise, in order to accommodate Planned Parenthood's ideological objection to legislation. Symbolic implications of the contested Indiana statute, House Enrolled Act ("HEA") 1337, are for philosophers to sort out, not for federal courts to enjoin. The Petition should be granted to rein in judicial interference with legislation consistent with the Constitution, as the Indiana statute plainly is. The same standard of review for regulating hospitals should apply to abortion clinics, without any favoritism for Planned Parenthood.

It is an overreach by abortion-rights supporters to insist on a right to dispose of abortive remains in an

inhumane way. Nothing in *Roe v. Wade* and its progeny justify interference by courts with State laws governing the disposal of the results of abortions. The Petition should be granted to correct this severe distortion of law by the Seventh Circuit, and end its conflict with the Eighth Circuit and the Constitution.

The second question presented, which concerns Indiana's ban on abortions motivated solely by discrimination, likewise warrants review here. As with the first question discussed above, the real objection is to the symbolism in the statute, and not to any burdens placed on actual abortions. It is unknown whether any abortions in Indiana are actually performed "solely" for discriminatory reasons, which would be eugenics. It is unknown what effect, if any, informing women of a ban on discrimination would have. The legal challenge is primarily against the spirit of the law, which is not for courts to enjoin in the absence of an actual "case" or "controversy" as to its application. U.S. CONST. Art. III, § 2. Without evidence of any interference with actual abortions, there is nothing for courts to adjudicate.

The Petition could spark debate within the Court on whether to limit review to only the first question, concerning disposal of abortive remains. But both questions presented are interrelated, and should not be separated: both concern objections to the symbolic significance of legislation rather than any constitutionally significant burdens imposed. The Court should grant the Petition on both questions to limit judicial overreach based on symbolism rather than cognizable injury.

Ideological disputes about abortion, unsupported by legal injury, are not properly within the domain of

the federal courts. Yet the objections to the Indiana statute are primarily political rather than legal. Lawsuits, like this one, which seek to perpetuate the symbolism of *Roe v. Wade* should be dismissed. The decision below should be reversed, and remanded with instructions to dismiss the lawsuit.

The Petition for Writ of Certiorari should be granted on both questions presented.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED ON THE FIRST QUESTION BASED ON THE CONFLICT WITH THIS COURT'S RULINGS CONCERNING RATIONAL-BASIS REVIEW, AND WITH THE EIGHTH CIRCUIT.

The Constitution plainly does not prevent the State of Indiana from requiring humane disposal of abortion remains. The People of Indiana, through the legislative process, can properly decide for themselves how the remains from abortion should be disposed. *See* HEA 1337, Ind. Code § 16-34-3-4(a). The Indiana provision is thereby fully constitutional, and the Petition should be granted to reverse the unprecedented ruling below to the contrary.

The decision below ran afoul of clear authority of this Court on the rational-basis standard of review:

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, ***it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature***.

FCC v. Beach Communications, 508 U.S. 307, 315 (1993) (emphasis added). Despite this, the Seventh Circuit impermissibly relied on its perception of an alleged legislative motivation.

This Court further emphasized, in this widely cited precedent by Justice Thomas, that:

> [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data "'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'"

Beach Communications, 508 U.S. at 315 (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973), quoting *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 510 (1937)).

On rational-basis review – which both the district court and the Seventh Circuit agreed should apply here – this Court "ha[s] stressed that this standard of review is typically quite deferential; legislative classifications are 'presumed to be valid.'" *Lyng v. Int'l Union*, 485 U.S. 360, 370 (1988) (quoting *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)). This Court explained that "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Lyng*, 485 U.S. at 370 (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), inner quotations omitted).

Hence the burden is on Respondents, who attack the legislative classification in HEA 1337, "to negative every conceivable basis which might support it." *Lehnhausen*, 410 U.S. at 364 (internal quotation

marks omitted). *See also Hodel* v. *Indiana*, 452 U.S. 314, 331-332 (1981).

One need not look far today to see examples that easily justify the Indiana provision for humane disposal of abortion remains. For example, it was widely reported recently that:

> Police raided Perry Funeral Home on Trumbull Ave. Friday afternoon and found 36 fetuses in boxes and an additional 27 fetuses in freezers there, Detroit police chief James Craig said. "I'm stunned," Craig said. "My team is stunned. ***God help those families***."

George Hunter, "Detroit police find 63 fetuses in boxes, freezers of funeral home," Oct. 19, 2018 (emphasis added).[2] *See also* David Daleiden, "Why Are Taxpayers Buying Parts of Aborted Babies?", *Washington Examiner*, Oct. 23, 2018 (describing termination by the Trump Administration of one such contract by HHS for "taxpayer-funded experimentation" that included the harvesting of "fresh aborted baby body parts").[3] As physicians, members of *Amicus* AAPS have an interest in maintaining the dignity of patients and the medical profession, and then-Governor Mike Pence took a constitutional step towards protecting that dignity by signing HEA 1337 into law.

Yet the decisions below flouted the controlling authority concerning rational-basis review of abortion

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[2] https://www.detroitnews.com/story/news/local/detroit-city/2018/10/19/detroit-police-widening-investigation-into-local-funeral-homes/1698282002/ (viewed Nov. 11, 2018).

[3] https://www.washingtonexaminer.com/opinion/op-eds/why-are-taxpayers-buying-parts-of-aborted-babies (viewed Nov. 11, 2018).

industry practices. As Judge Manion aptly observed in his dissent, the panel majority contravened well-established norms of the undemanding rational-basis standard of review, and the Seventh Circuit went beyond what *Casey* might arguably require:

> The court then goes further than *Casey* requires, ... invalidating Indiana's requirement that abortion clinics bury or cremate fetal remains. I cannot agree. This is but the latest example of the legal misdirection that occurs in abortion cases. See *Hill v. Colorado*, 530 U.S. 703, 741-42 (2000) (Scalia, J., dissenting). Under traditional rational basis review, if state action doesn't infringe upon a fundamental right or affect a protected class, we will uphold it so long as it is rationally related to a legitimate state interest. The fetal remains provision easily satisfies that extremely deferential standard. That part of Indiana's law rationally advances Indiana's interests in protecting public sensibilities and recognizing the dignity and humanity of the unborn.

Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 888 F.3d 300, 310 (7th Cir. 2018) (Manion, J., dissenting) (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality decision)).

Indeed, *Casey* does not even apply to the disposal of abortion remains, and there is nothing in the record demonstrating any burden that HEA 1337 imposes on abortion by requiring a humane disposal of the remains. Instead, the facial challenge to the statute is primarily an objection to its symbolic implications. By invalidating the statute, the courts below strayed too

far into the realm of an ideological dispute, which is not the proper basis for a ruling by a federal court.

As Justice Kennedy wrote in rejecting a facial challenge to the filtering provisions of the Child Internet Protection Act (CIPA):

> If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that ***would be the subject for an as-applied challenge, not the facial challenge made in this case.***

United States v. Am. Library Ass'n, 539 U.S. 194, 215 (2003) (Kennedy, J., concurring, emphasis added).

The Seventh Circuit decision also conflicts directly with an Eighth Circuit decision of nearly thirty years ago. "We find the [abortion remains disposal] statute facially valid as construed, and that it does not interfere with a woman's right to obtain an abortion. We therefore reverse the district court and direct entry of judgment for the State." *Planned Parenthood v. Minnesota*, 910 F.2d 479, 488 (8th Cir. 1990).

Indiana's classification of the remains of abortion as human may have symbolic significance, and philosophers could debate this issue. But disputes over symbolism or philosophy do not constitute a proper Article III case or controversy that would justify judicial invalidation of a statute. *Cf. Waterkeeper All. v. EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) (an "Article III renaissance is emerging" in order to ensure that "textualism will [not] be trivialized" in the context of

Chevron deference, citing a decision by now-Justice Gorsuch).

It was an error of national significance for the courts below to misapply the rational-basis standard against HEA 1337 with respect to the first question presented here. The Petition should be granted.

II. THE PETITION SHOULD BE GRANTED ON THE SECOND QUESTION REGARDING THE BAN ON DISCRIMINATION.

When constitutional rights collide, one must yield. The judicially created *Roe v. Wade* never authorized discrimination, and its supporters overreach by demanding to elevate it above the well-established authority of a State to prohibit discrimination. While *Roe v. Wade* has been mistakenly called "super-precedent", there is nothing of the sort. "Of course, there's no such thing as 'super-precedent' — any case may be overruled by five Supreme Court Justices." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 311-12 (7th Cir. 2018) (Manion, J., dissenting).

The Republican Party was founded in part to reject the notion that a judicially created property right in slavery could override other constitutional rights, such as freedom of speech. In the years running up to the Civil War, Congress even adopted a self-imposed gag rule against bills relating to slavery, but the young Republican Party boldly rejected suppression of free speech on the issue of slavery. *See* Michael Kent Curtis, "The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37," 89 Nw. U.L. Rev. 785, 859 (1995) ("By 1859, a broad

defense of free expression on the subject of slavery was a central part of the ideology of the Republican Party. In the eyes of many, free expression became a right of American citizens."). Just as rights to slavery did not override freedom of speech, abortion rights should not override laws against discrimination.

Yet under the view embraced by Respondents and the decisions below, abortion clinics could seek to abort African American babies, or engage in gender-based abortion as in China. HEA 1337 prohibits abortions motivated solely by discrimination, and this does not transgress *Roe v. Wade*, 410 U.S. 113 (1973), which did not create any constitutional right to discriminate.

Nothing in the record shows any burden imposed on abortion by the non-discrimination provisions in HEA 1337, Ind. Code §§ 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8, or by its requirement to disclose the ban to patients. *Id.* § 16-34-2-1.1(a)(1)(K). Despite this lack of evidence, the courts below elevated a right to abortion above the right to be free of discrimination, and this error warrants review by this Court. Any collision of these two rights must be resolved in favor of the authority of a State to prohibit discrimination. It is beyond irony that abortion is justified in the Constitution based on the same Fourteenth Amendment that was enacted to eradicate discrimination. The demand by some for abortion should not overrun the more than 150-year effort to eradicate discrimination.

The second question presented, concerning the invalidation of the non-discrimination provisions of the Act, does not implicate *Casey* on the undeveloped record in this facial challenge to HEA 1337. It is unproven that any abortions are being performed in

Indiana based "solely" on racial discrimination, given that a mother shares the same race with her offspring. Courts should not be in the business of invalidating laws without some showing that the laws have an unconstitutional impact, and yet no such showing has been made here.

This facial invalidation of all the non-discrimination provisions of HEA 1337 does not comport with the severability provision in the Indiana Code:

> (a) If any provision of this Code as now or later amended or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions that can be given effect without the invalid provision or application.
>
> (b) Except in the case of a statute containing a nonseverability provision, each part and application of every statute is severable. If any provision or application of a statute is held invalid, the invalidity does not affect the remainder of the statute unless ...."

Ind. Code § 1-1-1-8 (omitting exemptions that do not apply here).

The non-discrimination provisions in HEA 1337 have multiple parts, addressing discrimination based on race, gender, or disability. These provisions are severable from each other as dictated by the foregoing severability requirement of the Indiana Code. Even if there were a constitutional infirmity in one of the anti-discrimination provisions of HEA 1337, that would not justify invalidation of the other anti-discrimination provisions.

Moreover, nothing in the record shows any conflict with *Casey*. It held that "a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest." *Planned Parenthood v. Casey*, 505 U.S. at 886. *See also Harris v. McRae*, 448 U.S. 297, 325 (1980) ("Congress has [properly] established incentives that make childbirth a more attractive alternative than abortion.").

The abortion industry already receives unique favoritism in the United States, and hardly needs an unlimited right to discriminate too. In contrast, in Israel abortion is allowed only if there is an application to and approval by a Pregnancy Termination Committee, and "as of 1993, legal access to abortion had been narrowed through stricter limitations on the discretion of" those committees to approve abortion. Noya Rimalt, "When Rights Don't Talk: Abortion Law and the Politics of Compromise," 28 Yale J.L. & Feminism 327, 355 (2017).

The real objection to HEA 1337 may be its symbolic significance in prohibiting abortion based solely on discrimination. But disagreement with such symbolism is not a case or controversy within the proper purview of the federal courts. Article III standing never existed below for the Respondents to challenge, without evidence, the symbolism in HEA 1337. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (courts should "refrain[] from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches") (quoting *Warth* v.

Seldin, 422 U.S. 490, 499-500 (1975)). Indiana's ban on discriminatory abortions, and its disclosure requirement for the ban, are "most appropriately addressed in the representative branches," and the decisions below erred in ruling otherwise.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, it should be fully granted on both questions presented.

Respectfully submitted,

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No. 18-483

In The Supreme Court of the United States

KRISTEN BOX, COMMISSIONER,
INDIANA DEPARTMENT OF HEALTH, ET AL.,
Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA
AND KENTUCKY, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICUS[1]

CatholicVote.org Education Fund ("CatholicVote") is a nonpartisan voter education program devoted to building a Culture of Life. It seeks to serve our country by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission and focus on the dignity of the person, CatholicVote is deeply concerned about the fetal remains statute at issue in *Planned Parenthood of Ind. & Ky., Inc. v. Commissioner of Ind. State Department of Health* ("*PPINK*"), 888 F.3d 300 (7th Cir. 2018), as well as the standard courts should apply when analyzing statutes passed to preserve and promote fetal human life. Whereas *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), safeguard the States' interest in potential life, the Seventh Circuit and other lower federal courts threaten that interest by interpreting it narrowly and in a manner inconsistent with those decisions. CatholicVote, therefore, comes forward to support the right of States to recognize and promote the dignity of fetal human life through fetal remains statutes and otherwise.

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[1] As required by Rule 37.2(a), counsel of record for each party received timely notice of the intent to file this amicus brief and consented to its filing. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

REASONS FOR GRANTING THE WRIT

Review is warranted in this case for at least two reasons. First, the Seventh Circuit's decision in *PPINK* creates a circuit conflict with the Eighth Circuit on an issue of national import—the constitutionality of fetal remains statutes—and in the process demonstrates broad-based confusion between and among lower federal courts regarding the standard to apply to abortion regulations designed to advance the States' "legitimate and substantial interest in preserving and promoting fetal life." *Gonzales*, 550 U.S. at 145. In the Seventh Circuit alone, ten judges have authored or joined four different opinions supporting three distinct analyses of Indiana's fetal remains statute. The panel dissent and the four judges who dissented from denial of rehearing en banc joined the Eighth Circuit in finding that fetal remains statutes readily satisfy rational basis review. The panel majority, on the other hand, concluded that the Indiana statute could not survive that deferential standard because the State's interest in promoting fetal life was not legitimate and no other interest supported the law. Finally, the three judges concurring in the denial of rehearing en banc argued (consistent with district courts in Texas, Louisiana, and Arkansas) that the undue burden test, not rational basis review, should apply to Indiana's fetal remains statute. Moreover, given that the Seventh Circuit denied en banc review, the circuit conflict is entrenched, and only this Court can resolve the split and clarify the constitutionality of fetal remains statutes, which "show [a State's] profound respect for the life within the woman." *Id.* at 157.

Second, the Seventh Circuit's rigorous rational basis analysis directly conflicts with this Court's articulation of that standard in cases such as *Heller v. Doe*, 509 U.S. 312 (1993), and *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). Rather than consider whether "any state of facts reasonably may be conceived to justify" Indiana's law, *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), the Seventh Circuit panel distinguished the Eighth Circuit's decision in *Planned Parenthood of Minn. v. Minnesota*, 910 F.2d 479 (8th Cir. 1990), which upheld a similar law under rational basis review, and concluded that no legitimate interest supported the Indiana law.

In addition, the split between and among the Seventh and Eighth Circuits, judges within the Seventh Circuit, and district courts in Texas, Louisiana, and Arkansas as to the proper standard to apply to fetal remains statutes—rational basis or undue burden—highlights the need for this Court to clarify the governing standard. Furthermore, if the Court determines that the undue burden test is the appropriate standard, this Court also should explain whether and how the balancing test in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), applies to regulations that are designed to advance and promote the States' interest in fetal human life.

I. The Court Should Grant Certiorari Because the Circuits Are in Conflict over the Appropriate Standard of Review to Apply to Fetal Remains Statutes.

In *Roe v. Wade*, this Court expressly acknowledged that States have an "important and legitimate interest in potential life." 410 U.S. 113, 163 (1973). Almost 20 years later, though, the plurality in *Casey* concluded that *Roe* and its progeny significantly "undervalued" the States' interest in "promoting" and "protecting the life of the unborn." *Casey*, 505 at 873. And *Gonzales* confirmed that a central premise in *Casey* is "that the government has a legitimate and substantial interest in preserving and promoting fetal life." *Gonzales*, 550 U.S. at 145. The split between the Seventh and Eighth Circuits affords this Court with a clean vehicle to determine how courts should assess and value a State's interest in protecting and promoting fetal human life through fetal disposition statutes or otherwise.

At least seven States have adopted fetal remains statutes, which promote respect for fetal human life. By providing for the respectful disposal of fetal remains, a State conveys its belief that the human fetus, which alone has the potential to become a person under the Fourteenth Amendment, is worthy of dignity and respect both while it is alive and after its death. *See Gonzales*, 550 U.S. at 157 ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."). In striking down Indiana's fetal remains statute, the Seventh Circuit engendered an inter-Circuit conflict and reinforced

another conflict between and among the lower courts. First, the Seventh Circuit expressly rejected the Eighth Circuit's conclusion that a Minnesota fetal remains statute was constitutional. In so doing, the Seventh Circuit denied that Indiana had even a legitimate interest in fetal life that might support the State's fetal remains statute and insisted that, even if the State had an interest in "the humane and dignified disposition of an aborted fetus," the statute was not rationally related to that interest. *PPINK*, 888 F.3d at 309.

Second, the Seventh Circuit's application of rational basis review is inconsistent with decisions of federal district courts in Texas, Louisiana, and Arkansas to assess fetal remains statutes under the undue burden standard. Widespread uncertainty as to the standard governing fetal remain statutes is evidenced by the conflict within the Seventh Circuit itself. Three Seventh Circuit judges contend that the undue burden test should apply, five would follow the Eighth Circuit in applying a deferential rational basis review, and two others (the two constituting the minority position but establishing the binding precedent in the Seventh Circuit) have employed a heightened form of the rational basis standard. This Court's review is warranted, therefore, to determine whether fetal remains statutes require undue burden review and, if so, how *Casey* and *Hellerstedt* apply in this context.

A. The Seventh Circuit's Stringent Rational Basis Analysis Openly Conflicts with the Eighth Circuit, which Gives Greater Deference to a State's Legislative Judgment.

In *PPINK*, the Seventh Circuit expressly considered and rejected the Eighth Circuit's decision upholding Minnesota's fetal remains statute. *PPINK*, 888 F.3d at 308-09. While both courts purported to apply the rational basis standard, the Seventh Circuit panel diverged sharply from the Eighth Circuit's rational basis analysis in two important respects. First, the panel concluded that "the State's interest in requiring abortion providers to dispose of aborted fetuses in the same manner as human remains is not legitimate." *Id.* at 308. According to the panel, the Indiana statute treated a fetus like a human being, which was tantamount to recognizing the fetus as a Fourteenth Amendment "person." *Id.* at 308. The panel emphasized that because a fetus is not a person under *Roe*, Indiana's interest was illegitimate. In so holding, the Seventh Circuit directly contradicted the Eighth Circuit, which concluded that a State can validly treat fetal human remains like non-fetal human remains:

> Planned Parenthood's argument that the statute represents the state's conclusion that fetal remains are the equivalent of human remains is also unavailing ... [and] even assuming this is the true purpose, we do not find it to be an invalid purpose. A state may make a value judgment favoring childbirth over abortion.

Planned Parenthood of Minn., 910 F.2d at 487.

The Seventh Circuit also attempted to distinguish fetal homicide and wrongful death statutes from Indiana's fetal remains disposition requirements. According to the court, whereas the former seek to protect the fetus in utero, when dealing with fetal remains "there is no potential life at stake." *PPINK*, 888 F.3d at 308. In the Seventh Circuit, then, the State's interest in protecting potential life apparently is legitimate only if a challenged statute directly regulates the treatment of a living fetus. *See id.* ("*Gonzales* involved a 'ban on abortions that involve partial delivery of a *living* fetus.'" (quoting *Gonzales*, 550 U.S.at 148)). This holding not only is inconsistent with the Eighth Circuit's decision, *see Planned Parenthood of Minn.*, 910 F.2d at 488 ("[W]e therefore find that the fetal disposal statute is reasonably related to the state's legitimate interests."), but also threatens to "repudiate[]" a premise that this Court found to be central to *Casey*'s analysis—that the State "has a legitimate and substantial interest in [both] *preserving* and *promoting* fetal life." *Gonzales*, 550 U.S. at 145 (emphasis added).

Fetal disposition statutes *promote* a State's view that fetal human life is unique and valuable by treating the remains of the fetus with dignity and respect. Although such statutes do not preserve the life of the deceased fetuses to which the laws apply, *Casey* and *Gonzales* do not define the States' interest in potential life so narrowly. *See Casey*, 505 U.S. at 877 ("Regulations which do no more than create a structural mechanism by which the State ... may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle

to the woman's exercise of the right to choose."); *Gonzales*, 550 U.S. at 157 (explaining that the government may "express[] respect for the dignity of human life" through measures that are intended to stop the "'coarsen[ing of] society to the humanity of not only newborns, but all vulnerable and innocent human life, [which] mak[es] it increasingly difficult to protect such life'").

Yet the Seventh Circuit's restrictive interpretation of a State's interest in fetal human life makes it unclear whether a State has a legitimate interest in either fetal homicide statutes (because they apply only after the fetus is killed, a time when "there is no potential life at stake") or the dignified and respectful burial and cremation of non-fetal human remains (because after a human person passes away "there is no [person or human] life at stake"). *PPINK*, 888 F.3d at 308. Thus, review is necessary to resolve the inter-circuit conflict and to clarify the nature and scope of the States' interest in fetal human life.

Second, the Seventh and Eighth Circuits have imposed very different burdens on the government with respect to the requirement that a government interest and a regulation bear a "rational relationship." The Seventh Circuit required a strict connection between Indiana's fetal remains statute and its proffered interest in the "humane and dignified disposal of an aborted fetus." *Id.* at 309. After declaring that that interest is not legitimate because fetuses are not human, the panel contended that, even if the interest were legitimate, the fetal remains statute is not rationally related to the interest because the law does not treat fetuses as

human enough. *See id.* ("[T]he fetal disposition provisions do not treat aborted fetuses the same as human remains."); *Gonzales*, 550 U.S. at 160 ("There would be a flaw in this Court's logic ... were we first to conclude a ban on both D & E and intact D & E was overbroad and then to say it is irrational to ban only intact D & E because that does not proscribe both procedures."). While the fetal remains statute (1) permits a woman to dispose of fetal remains "in whatever manner she wishes, without restriction" and (2) allows for the "simultaneous cremation of aborted fetuses," Indiana provides an exhaustive list of the acceptable ways to dispose of non-fetal human remains and allows for simultaneous cremation of non-fetal human remains only with prior written consent of specified persons. *PPINK*, 888 F.3d at 309. Consequently, the panel held that it could not "identify a rational relationship between the State's interest in 'the humane and dignified disposal of human remains' and the law as written." *Id.*

The Seventh Circuit's analysis not only contravenes the deferential standard the Eighth Circuit employed, but also imposes an impossible standard on the State. *Casey* and *Roe* cannot be interpreted to require Indiana or any other State to treat human fetuses like non-fetal humans in all respects because, if the fetus must receive the same treatment as a human person, then abortion would be illegal. *See Roe*, 410 U.S. at 156-57 ("If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."). Rather, *Roe* and *Casey* distinguish between fetal human life and human

persons, which explains why Indiana can reasonably require the dignified and respectful treatment of fetal remains without mandating that fetal remains be treated in precisely the same way as other human remains.

Moreover, requiring a tight connection between the State's interest and the fetal remains statute contradicts the deferential standard used in the Eighth Circuit. According to the Eighth Circuit, under rational basis review "a legislature must have the latitude to 'establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every evil." *Planned Parenthood of Minn.*, 910 F.2d at 488. Applying this standard, the court concluded that it could not "disagree with this [legislative] judgment" and, therefore, held "that the fetal disposal statute is reasonably related to the state's legitimate interests." *Id.*

B. Lower Federal Courts Have Reached Conflicting Conclusions as to Whether Fetal Remains Statutes Implicate a Woman's Fundamental Right to Choose and, If So, What the Proper Standard of Review Is Post-*Hellerstedt*.

While the Seventh and Eighth Circuits diverged as to the constitutionality of fetal disposition statutes, they both (along with the four Judges who dissented from the denial of rehearing en banc in *PPINK*) determined that the statutes do not

implicate a fundamental right. *See PPINK*, 888 F.3d at 307 ("PPINK agrees that no fundamental right is at stake."); *Planned Parenthood of Minn.*, 910 F.2d at 486 (stating that the Minnesota statute has "no significant impact on a woman's exercise of her right to an abortion."). In her opinion concurring in the denial of rehearing en banc in *PPINK*, however, Chief Judge Wood (joined by Judges Rovner and Hamilton) disagreed with that determination. According to Chief Judge Wood, Indiana's fetal remains statute "involves a fundamental right" because it regulates "the final step in the overall process of terminating (or losing) a pregnancy." *PPINK*, No. 17-3163, 2018 WL 3655854, at *2 (7th Cir. June 25, 2018). Consequently, the Chief Judge contended that the undue burden test should apply, requiring courts to consider the financial costs of the statutorily required disposition of fetal remains, the possible psychological trauma resulting from "the potential stigmatizing impact of these measures," and the burden that the Indiana statute might have when viewed in tandem with other abortion regulations, "as is required under [*Hellerstedt*], 136 S. Ct. at 2309, 2313." *PPINK*, 2018 WL 3655854, at *3.

Consistent with Chief Judge Wood's assertion, district courts in Arkansas, Louisiana, and Texas have applied the undue burden standard set out in *Casey* and most recently interpreted in *Hellerstedt*. *See Hopkins v. Jegley*, 267 F. Supp.3d 1024, 1098 (E.D. Ark. 2017); *June Med. Servs., LLC v. Gee*, 280 F. Supp.3d 849, 868 (M.D. La. 2017); *Whole Woman's Health v. Smith*, No: A-16-CV-01300-DAE, 2018 WL 4225048 at *8 (W.D. Tex. Sept. 5, 2018). Each of

these courts has observed that *Hellerstedt* "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," *Hellerstedt*, 136 S. Ct. at 2309. Their invocation of *Hellerstedt*, however, raises at least three important questions that only this Court can answer.

First, does *Hellerstedt*'s balancing test or some other version of the undue burden standard apply when a regulation seeks to advance the State's "substantial" and "profound" interest in potential life? *Casey*, 505 U.S. at 876, 878. As support for the balancing test, *Hellerstedt* cites only to *Casey*'s treatment of Pennsylvania's parental consent and spousal notification requirements, which were predicated on interests other than the promotion of fetal human life.[2] Accordingly, given that *Hellerstedt* did not consider the nature or scope of the government's interest in potential life, this Court must determine whether and how the balancing test applies to a measure designed to serve that important and legitimate interest.

The Seventh and Eleventh Circuits and a district court in the Fifth Circuit have concluded that the same balancing test applies regardless of the

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[2] While the Seventh Circuit has suggested otherwise, *see Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. St. Dept. of Health*, 896 F.3d 809, 818 (7th Cir. 2018) (claiming that the State argued in *Casey* that "spousal notification and parental involvement ... were related to its interest in potential life."), in addressing the spousal notification and parental consent provisions, *Casey* considers only "the *husband's* interest in the potential life of the child" and not the State's. *See Casey*, 505 U.S. at 898 (emphasis added).

interest involved. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. St. Dept. of Health ("PPINK II")*, 896 F.3d 809, 818 (7th Cir. 2018) ("The State is incorrect that the standard for evaluating abortion regulations differs depending on the State's asserted interest or that there are even two different tests."); *West Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1326 (11th Cir. 2018) ("The State cites no support for the proposition that a different version of the undue burden test applies to a law regulating abortion facilities."); *Whole Woman's Health v. Hellerstedt ("Hellerstedt II")*, 231 F.Supp.3d 218, 228 (W.D. Tex. 2017) ("DSHS's argument that a different test applies when the State expresses respect for the life of the unborn is a work of fiction ... ."). If that is correct, then lower courts need guidance as to the weight of the States' interest in fetal human life and how that interest should be balanced against potential burdens.

Second, when are a regulation's benefits sufficient to survive *Hellerstedt*'s balancing test? Lower court decisions reflect confusion about how to weigh the benefits of an abortion regulation against its burdens. For example, district courts in the Fifth and Eighth Circuits have decided that "[a] regulation will not be upheld unless the benefits it advances outweigh the burdens it imposes." *Hopkins*, 267 F.Supp.3d at 1055-56. *See Hellerstedt II*, No. A-16-CA-1300, 2018 BL 30317, at *6 (W.D. Tex. Jan. 29, 2018) ("[T]he record suggests Chapter 697 imposes an undue burden on abortion access because its burdens exceed its benefits."). A district court in the Eleventh Circuit, on the other hand, has interpreted *Hellerstedt* to require a sliding scale under which a

State must show a greater purported benefit as the burden increases: "[T]he more severe the obstacle a regulation creates, the more robust the government's justification must be, both in terms of how much benefit the regulation provides towards achieving the State's interests and in terms of how realistic it is the regulation will actually achieve that benefit." *West Ala. Women's Ctr. v. Miller*, 299 F.Supp.3d 1244, 1262 (M.D. Ala. 2017).

Moreover, the Seventh and Eight Circuits approach the balancing test in ways that differ from these district courts and from each other. The Seventh Circuit insists that, "[i]f a burden *significantly* exceeds what is *necessary* to advance the state's interests, it is 'undue.'" *PPINK II*, 896 F.3d at 827 (emphasis added) (quoting *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015)). For its part, the Eighth Circuit interprets *Hellerstedt* to require a court to determine whether a regulation's "benefits are substantially outweighed by the burdens it imposes." *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017). These varying interpretations evidence the uneven application of *Hellerstedt*'s balancing test and the need for this Court to clarify its demands.

Third, if *Hellerstedt*'s balancing test applies to regulations designed to advance a State's interest in potential life, how does a court weigh the benefits associated with those regulations? *Hellerstedt* does not overrule *Casey* or *Gonzales*, but interprets principles underlying those decisions. Thus, if *Hellerstedt* requires balancing in all circumstances as the Seventh and Eleventh Circuits have

concluded, *Casey* and *Gonzales* necessarily employed the balancing test when upholding the various regulations that were enacted to promote the government's interest in potential life.

In both cases, this Court demanded very little in terms of benefit from those regulations. For example, *Casey* upheld Pennsylvania's 24-hour waiting period because of "[t]he *idea* that important decisions will be more informed and deliberate if they follow some period of reflection." *Casey*, 505 U.S. at 885 (emphasis added). Similarly, *Gonzales* sustained the partial-birth abortion ban based on a "reasonable inference" about its "necessary effect ... and the knowledge it conveys." *Gonzales*, 550 U.S. at 159. Moreover, in doing so, the *Gonzales* Court noted: "While we find *no reliable data* to measure the phenomenon, it seems *unexceptionable* to conclude some women come to regret their choice to abort ... ." *Id.* at 159 (emphasis added). Therefore, under *Casey* and *Gonzales*, it need only be conceivable that a regulation could cause a woman to choose childbirth over abortion for the regulation to yield benefits sufficient to survive the undue burden test.

Lower courts, however, are asking for much more. The Texas district court in *Smith* stated that "[t]he main benefit (indeed, perhaps the only benefit) of [Texas's fetal remains statute] is the expression of respect for potential life," a benefit the court considered "minimal." *Smith*, 2018 WL 4225048, at *14. In addition, in affirming an injunction against an Indiana law requiring an 18-hour waiting period following an ultrasound, the Seventh Circuit cited a lack of evidence that the waiting period would

produce the benefits the State claimed. *PPINK II*, 896 F.3d at 831 ("A statute that curtails the constitutional right to an abortion ... cannot survive challenge without evidence that the curtailment is justifiable by reference to the benefits conferred by the statute." (alteration in original) (quoting *Schimel*, 806 F.3d at 921)). These lower court decisions appear to "undervalue" the States' interest in preserving and promoting fetal human life and, consequently, conflict with *Casey* and *Gonzales*.

Supreme Court review is critical, then, because the lower courts are splintered as to (1) whether fetal disposition provisions implicate a fundamental right—a determination that, as Chief Judge Wood notes, "is capable of dictating the outcome" in abortion-related litigation—and (2) what the relationship between and among *Casey*, *Gonzales*, and *Hellerstedt* is and how the undue burden standard applies to the States' important interest in fetal human life.

II. Certiorari Should Be Granted Because the Seventh Circuit Misapplies the Rational Basis Standard of Review that This Court Has Articulated, Thereby Impermissibly Interfering with the Legislative Function.

Review also is proper in this case because the Seventh Circuit's application of the rational basis standard of review conflicts with binding precedent of this Court. Specifically, the Seventh Circuit fails to follow this Court's instructions in *Heller* and *Beach Communications* regarding the degree of

deference that courts must afford legislative judgments under rational basis review.

If a measure does not implicate a fundamental right, it need only "be rationally related to legitimate government interests" to withstand rational basis review. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). In this way, rational basis review is "a paradigm of judicial restraint." *Beach Commc'ns*, 508 U.S. at 314. As *Heller* explains, the rational basis standard requires courts to give broad deference to legislative acts:

> [R]ational-basis review ... "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." ... [A] legislature ... need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld ... if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

Heller, 509 U.S. at 319-20 (citations omitted). The standard is the same for both due process and equal protection challenges. *See Glucksberg*, 521 U.S. at 728 (citing *Heller*, 509 U.S. at 319-20).

Under the rational basis standard, "legislative choice ... may be based on rational speculation ... ." *Beach Commc'ns*, 508 U.S. at 315; *Heller*, 509 U.S. at 320 (same). And "[a] State ... has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320. Consequently, courts can consider any reasonable purpose—even purposes that never entered the mind of the legislature: "[B]ecause we never require a

legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. *See also Flemming v. Nestor*, 363 U.S. 603, 612 (1960) ("[I]t is ... constitutionally irrelevant whether [the possible justification this Court identified] in fact underlay the legislative decision, as it is irrelevant that the section [does] not extend to all to whom the postulated rationale might in logic apply.").

Moreover, under rational basis review, courts do not engage in means-ends testing:

> [C]ourts are compelled ... to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because "it is not made with mathematical nicety ... ." "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."

Heller, 509 U.S. at 321 (citations omitted). With this broad deference, "the precise coordinates of ... legislative judgment [are] virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Beach Commc'ns*, 508 U.S. at 316.

The problem in *PPINK* is that the Seventh Circuit panel applied the rational basis standard in a manner completely inconsistent with *Heller* and *Beach Communications*. Not only did the panel

refuse to consider the interest in public sensibilities that the Eighth Circuit credited, *PPINK*, 888 F.3d at 309 (dismissing the interest in "protecting the public's sensibilities" because "Indiana focuses on the interest of the *fetus*"), it also rejected Indiana's interest in "promoting respect for potential life." *Id.* at 308 (holding that Indiana lacked a legitimate interest because "there is no potential life at stake").

The Seventh Circuit's application of the rational basis standard reflects at least five serious conflicts with this Court's case law. First, the fact that this Court has determined a fetus is not a "person" for purposes of the Fourteenth Amendment is irrelevant to whether Indiana has a legitimate interest in the "humane and dignified disposal of human remains." *PPINK*, 888 F.3d at 308. In *Webster v. Reproductive Health Services*, 492 U.S. 490, 504 (1989), this Court found that no constitutional consideration even was warranted with respect to a declaration in the preamble of a Missouri law that "[t]he life of each human being begins at conception." And this Court repeatedly has recognized that a State may encourage childbirth over abortion, a position that implicitly reflects the State's view about personhood. *See, e.g.*, *Casey*, 505 U.S. at 886 ("[U]nder the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion ... ."); *Maher v. Roe*, 432 U.S. 464, 473-74 (1977) ("[T]he right in *Roe v. Wade* ... implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion ... .").

Second, as the Eighth Circuit pointed out in *Planned Parenthood of Minn.*, this Court "has

recognized the legitimate interest of states and municipalities in regulating the disposal of fetal remains from abortions and miscarriages." *Planned Parenthood of Minn.*, 910 F.2d at 481. In fact, less than two years after *Roe*, this Court affirmed without opinion a district court's decision upholding a statute requiring "the humane disposition of dead fetuses" as a valid exercise of the State's police power directed at public health. *Planned Parenthood Ass'n. v. Fitzpatrick*, 401 F.Supp. 554, 572-73 (E.D. Pa. 1975), *aff'd sub nom., Franklin v. Fitzpatrick*, 428 U.S. 901 (1976). Moreover, in *City of Akron v. Akron Center for Reproductive Health, Inc.*, this Court stated that, although the fetal remains disposition requirement at issue was unconstitutionally vague, the city was "free ... to enact more carefully drawn regulations that further its legitimate interest in proper disposal of fetal remains." 462 U.S. at 451 n.45, overruled on other grounds by *Casey*, 505 U.S. at 881-85.

Third, the *PPINK* panel conflated its consideration of the legitimacy of Indiana's interests with the question of whether the statute served one or more of those interests. Contrary to what the panel suggested, the fact that the disposition requirement applies to an aborted fetus in no way diminishes the legitimacy of Indiana's interest in promoting and protecting potential life. *See Gonzales*, 550 U.S. at 145 ("[A] premise central to [*Casey*'s] conclusion [is] that the government has a legitimate and substantial interest in preserving and promoting fetal life ... ."); *Casey*, 505 U.S. at 870 ("[T]he State has a legitimate interest in promoting the life or potential life of the unborn ... ."); *Roe*, 410

U.S. at 154 ("[A] State may properly assert [an] important interest[] ... in protecting potential life."). Thus, the Seventh Circuit obscured the relevant question under rational basis review—whether Indiana's fetal remains disposition requirement conceivably could serve the interest.

Fourth, the court in *PPINK* improperly attempted to divine Indiana's actual motive in enacting the requirement and then assessed the requirement's effectiveness relative to the perceived motive. Given pre-existing requirements of Indiana law, the court determined that the State could not have been seeking to advance a public health interest because that interest already was protected. *See PPINK*, 888 F.3d at 309 ("[T]he State's interest here goes well beyond the sanitary or unitary disposal of aborted fetuses, interests which are already being carried out under current Indiana law and health regulations ..."). But *Beach Communications* instructs that a State's motivation "is *entirely irrelevant* for constitutional purposes." *Beach Commc'ns*, 508 U.S. at 315 (emphasis added). That Indiana could have a public health reason for requiring different types of surgical "byproducts" to be disposed of in different ways is wholly conceivable, and that is enough to sustain the fetal remains disposition requirement under *Fitzpatrick* regardless of whether State legislators had some other purpose in mind and even if a court believes the measure is redundant. *See Beach Commc'ns*, 508 U.S. at 314 ("[J]udicial intervention is generally unwarranted no matter how unwisely we may think

a political branch has acted." (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).[3]

Fifth and finally, the Seventh Circuit engaged in the type of means-ends analysis that is repugnant to rational basis review. Under *Heller*, "courts are compelled ... to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. Nevertheless, the circuit court inappropriately evaluated the extent to which existing law already addressed public health concerns regarding the disposition of fetal remains. In addition, after assuming that the State had a legitimate interest, the panel evaluated the Indiana statute's fit, concluding that the law did not treat fetal remains sufficiently like Indiana treats other human remains. Thus, the panel ignored this Court's admonition in *Beach Communications* that "the precise coordinates of ... legislative judgment [are] virtually unreviewable" under the rational basis standard. *Beach Commc'ns*, 508 U.S. at 316.

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[3] In addition, under *Gonzales*, the requirement easily could survive rational basis review as a regulation that might advance the State's interest in promoting potential life. Over Justice Ruth Bader Ginsberg's objection that the federal partial-birth abortion ban "saves not a single fetus from destruction, for it targets only a *method* of performing abortion," *Gonzales*, 550 U.S. at 181 (Ginsberg, J., dissenting), this Court upheld the ban as a measure whose message might encourage some women to choose childbirth over abortion. *See Gonzales*, 550 U.S. at 160 ("It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term ... .").

As this Court has explained, applying rational basis review correctly is critical in our system of separation of powers: "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Beach Commc'ns*, 508 U.S. at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973)). Thus, review of the Seventh Circuit's decision is warranted to confirm the proper application of rational basis review and, in the process, to protect against judicial interference with the policy-making role of the legislative branch.

CONCLUSION

For the reasons set forth above, this Court should grant Indiana's petition for a writ of certiorari.

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No. 18-483

In the Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA DEPARTMENT OF HEALTH, *ET AL.*

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS IN SUPPORT OF REVERSAL

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QUESTIONS PRESENTED

1. Whether a State may require health care facilities to dispose of fetal remains in the same manner as other human remains, *i.e.*, by burial or cremation.

2. Whether a State may prohibit abortions motivated solely by the race, sex, or disability of the fetus and require abortion doctors to inform patients of the prohibition.

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No. 18-483

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Respondents.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"),[1] a nonprofit Illinois corporation founded in 1981, has consistently defended federalism and supported state and local autonomy in areas – such as public health – of traditionally state and local concern. In addition, EFELDF has a longstanding interest in protecting unborn life and in adherence to the Constitution as

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

written. For these reasons, EFELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Planned Parenthhod chapters and doctors have sued Indiana officials to challenge Indiana's House Enrolled Act ("HEA") 1337. *Amicus* EFELDF adopts the facts as stated by Indiana. *See* Pet. at 3-13. Insofar as these are facial challenges, the "facts" are the challenged Indiana statutes.

Constitutional Background

The federal Constitution preempts state law whenever the two conflict. U.S. CONST. art. VI, cl. 2. The merits questions presented here involve the contours of federal abortion rights created by this Court in *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny. Those abortion rights are not absolute, but balance against states' powers to regulate maternal health and safety, as well as to protect the life of the fetus under *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and its progeny.

Under Article III, federal courts cannot issue advisory opinions and instead must focus on cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). Standing doctrine measures the necessary effect on plaintiffs under a tripartite test: cognizable injury to the plaintiffs, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). In addition to that constitutional baseline, standing doctrine also includes prudential elements, including the need for those seeking to assert absent third parties' rights to have their own Article III standing and a close relationship with the

absent third parties, whom a sufficient "hindrance" keeps from asserting their own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004).

Statutory Background

This litigation concerns two parts of Indiana's House Enrolled Act ("HEA") 1337: (1) a fetal-remains provision requiring burial or cremation of fetal remains by healthcare facilities, Ind. Code § 16-34-3-4(a), but that requirement does not apply to pregnant woman who get the abortion, *id.* §16-34-3-2(a); and (2) an anti-discrimination provision that prohibits aborting a fetus on the basis of race, sex, or disability. *Id.* §§16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8.

SUMMARY OF ARGUMENT

This Court should normalize abortion litigation to the same standards (*e.g.*, on third-party standing and facial challenges) that apply to other constitutional claims (Section I). With respect to the fetal-remains provisions, the Seventh Circuit did not follow binding precedent on the rational-basis test, which credits not only why a government acted but also any other plausible bases on which the government *may have* acted (Section II.A). In doing so, the Seventh Circuit split with the Eighth Circuit and this Court on the viability of fetal-remains laws (Section II.B), but was correct that the rational-basis test – as opposed to *Roe-Casey* undue-burden test – applied here because Planned Parenthood lacks third-party standing to assert female patients' *Roe-Casey* rights (Section II.C). With respect to the eugenics provisions, the Seventh Circuit would extend a constitutional right without first assuring itself and this Court that Planned Parenthood has third-party standing or that

the third-party rights holders both want these rights pressed and themselves have a case or controversy (Section III).

ARGUMENT

I. THIS COURT SHOULD REJECT THE PRINCIPLE THAT ABORTION CASES OPERATE UNDER DIFFERENT RULES THAN ANY OTHER LITIGATION.

EFELDF agrees with Judge Manion's partial concurrence and dissent that only this Court can cure "the legal misdirection that occurs in abortion cases." Pet. App. 21a-22a (*citing Hill v. Colorado*, 530 U.S. 703, 741-42 (2000) (Scalia, J., dissenting) (Manion, J., concurring in part and dissenting in part). As Justice Scalia explained:

> None of these remarkable conclusions should come as a surprise. *What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.*
>
> ...
>
> Does the deck seem stacked? You bet. As I have suggested throughout this opinion, *today's decision is not an isolated distortion of our traditional constitutional principles, but is one of many aggressively proabortion novelties announced by the Court in recent years.* Today's distortions, however, are particularly blatant.

Hill, 530 U.S. at 741, 764-65 (citations omitted, emphasis added) (Scalia, J., dissenting). The doctrinal distortions to which Justice Scalia referred include selectively neutering the doctrines of narrow tailoring and overbreadth, *Hill*, 530 U.S. at 762, ignoring content-based regulation of speech, *id.* at 746-47, and inventing a "right to be left alone" in a public forum, *id.* at 754. But the issue extends well beyond speech, such as third-party standing, *compare Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2321-23 (2016) (Thomas, J., dissenting) *with Kowalski*, 543 U.S. at 128-30, and the availability of facial challenges. *Compare Casey*, 505 U.S. at 895 *with U.S. v. Salerno*, 481 U.S. 739, 745 (1987). There is simply no warrant in the Constitution for this Court to favor one right – which is not enumerated – over many other enumerated rights.

II. THIS COURT SHOULD REVIEW THE SEVENTH CIRCUIT'S DISTORTION OF THE RATIONAL-BASIS TEST AND RESOLVE THE SPLIT IN AUTHORITY OVER FETAL-REMAINS STATUTES.

The Seventh Circuit's rational-basis analysis of the fetal-remains statute defies this Court's precedent on the rational-basis test and warrants review.

A. The Seventh Circuit misapplied the rational-basis test.

The Seventh Circuit majority invalidated the fetal-remains statute under the rational-basis test, but misapplied that test. Regardless of whether that misapplication represents a garden-variety split with other circuits' and this Court's precedents under the rational-basis test or yet another instance of there

being different rules for abortion cases, this Court should grant the writ.

A successful rational-basis plaintiff must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 462-63 (1988). Moreover, it is enough if the challenged state actor "rationally may have been considered [it] to be true" that the challenged state law would provide benefits. *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992). Further, because "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), rational-basis plaintiffs cannot prevail by marshaling "impressive supporting evidence ... [on] the probable consequences of the [statute]" *vis-à-vis* the legislative purpose. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981). Instead, they must affirmatively negate "the *theoretical* connection" between the two. *Id.* (emphasis in original). The Seventh Circuit evaded the clear and well-understood confines of rational-basis review, and this Court's review is required to correct that split with precedents from this Court and other circuits.

Instead of considering the bases on which Indiana plausible *may have acted*, the panel majority seeks to pin purportedly impermissible views on why Indiana *did* act. One such *non sequitur* is the argument that a fetus does not qualify as a "person" for purposes of the

Fourteenth Amendment. Pet App. 17a (*citing Roe*, 410 U.S. at 158). An adult corpse also lacks personhood under the Fourteenth Amendment, *Cincinnati, H. & D. R. Co. v. McCullom*, 183 Ind. 556, 559-60, 109 N.E. 206, 208 (Ind. 1915); *Robertson v. Wegmann*, 436 U.S. 584, 590-92 (1978), but that does make the remains anything other than human remains.

Contrary to the Seventh Circuit's misapplication of the rational-basis test, it is irrelevant that Indiana choose not to regulate how the mother of an aborted fetus disposes of her child's remains. Legislatures have wide authority to solve only part of a perceived problem, leaving the balance to future legislation, *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487-89 (1955), which Indiana has done. Moreover, if Indiana never regulates maternal actions, that would not matter: "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). Classifications do not violate Equal Protection simply because they are "not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). "Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (interior quotations omitted); *Murgia*, 427 U.S. at 315-317 (rational-basis test does not require narrow tailoring). Once again, the Seventh Circuit

majority's focus on this aspect of Indiana's law did not apply the rational-basis test correctly.

Either to ensure a properly applied rational-basis test or to prevent the creation of yet another abortion exception to the rules of constitutional litigation, this Court should resolve the split in authority here.

B. States have a legitimate interest in fetal remains.

This Court already has recognized that states have a "legitimate interest in proper disposal of fetal remains," *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 452 n.45 (1983), *abrogated on other grnds.*, *Casey*, 505 U.S. at 882-83, and the Eighth Circuit has upheld a law like Indiana's. *See Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479, 481 n.2 (8th Cir. 1990). This Court should resolve the split in authority over this issue.

Further, this Court should reject the Seventh Circuit's attempt to paint the Eighth Circuit's holding as mere *dicta* because "'Planned Parenthood conceded the state had a legitimate interest in protecting public sensibilities.'" Pet. App. 17a (*quoting Planned Parenthood of Minn.*, 910 F.2d at 488). That concession merely acknowledged this Court's finding in *City of Akron*, 462 U.S. at 452 n.45. Even without a Supreme Court decision compelling a concession, a party cannot evade a holding by refusing to defend the most indefensible and obvious faults in its position. Indeed, *Hellerstedt* itself acknowledged the weakness of *stare decisis* for holdings reached through a party's waiver

of an issue, 136 S.Ct. at 2320, but weak *stare decisis* is still *stare decisis*: it is not *dicta*.[2]

The Seventh Circuit's result thus conflicts with decisions of other circuits – not only in the rational-basis methodology used, *see* Section II.A, *supra*, but also in the substantive result reached. This litigation is an appropriate vehicle to resolve these splits.

C. The rational-basis test applies because Planned Parenthood lacks third-party standing to enforce *Roe-Casey* rights.

Leaving temporarily aside the important fact that the Seventh Circuit majority *misapplied* the rational-basis test, it is also important to note that the majority was correct to apply the rational-basis test, rather than the *Roe-Casey* undue-burden framework. With respect to fetal-remains, the abortion-industry lacks third-party standing to enforce its patients' *Roe-Casey* rights.

While EFELDF does not doubt that practicing physicians have close relationships with their regular patients, the same is simply not true for hypothetical relationships between Planned Parenthood and its *future* patients who may seek abortions at an abortion clinic: an "*existing* attorney-client relationship is, of

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[2] Significantly, the Minnesota case did not involve a situation where the parties "desired precisely the same result," so that "there is, therefore, no case or controversy within the meaning of Art. III of the Constitution." *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47-48 (1971) (citation omitted). An Article III case or controversy existed between the parties, and Planned Parenthood conceded – *as it had to* – that states have an interest in fetal remains. *See* MINN. R. PROF'L CONDUCT r. 3.3 (counsel's duty of candor to tribunal).

course, quite distinct from the *hypothetical* attorney-client relationship posited here." *Kowalski*, 543 U.S. at 131 (emphasis in original). Women do not have regular, ongoing, physician-patient relationships with abortion doctors in abortion clinics.

Before *Kowalski* was decided in 2004, "the general state of third party standing law" was "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "in need of what may charitably be called clarification." *Miller v. Albright*, 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). Since *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support third-party standing. As such, Planned Parenthood lacks third-party standing to assert *Roe-Casey* rights unless it meets this Court's criteria for doing so. Specifically, the instances where this Court has found across-the-board standing for abortion doctors involve laws that apply equally to *all abortions* – or an entire category of abortions – and to *all relevant abortion doctors*.[3] That scenario provides the required identity of interests between the women patients who would receive the abortions and the physicians who would perform the abortions.

If this Court found that Planned Parenthood lacks third-party standing to assert its patients' *Roe-Casey* rights, the rational-basis test would apply. *Village of*

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[3] *See, e.g.*, *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (identity of interests existed between women seeking abortions and doctors performing them because the law outlawed all abortions, with exceptions only for the mother's health, rape, and birth defects); *City of Akron*, 462 U.S. at 440 n.30; *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 62 (1976).

Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263 (1977) (elevated scrutiny does not apply if plaintiff cannot assert third parties' rights). Because the rational-basis test *correctly applies* here, this Court should review whether the rational-basis test was *applied correctly*.

III. THIS COURT SHOULD REJECT THE SEVENTH CIRCUIT'S ALLOWING THIS LITIGATION TO PROCEED FACIALLY UNDER *ROE-CASEY* RIGHTS WITHOUT ANY EVIDENCE THAT INDIANA INFRINGED *ROE-CASEY* RIGHTS.

As Indiana explains, the *Roe-Casey* right never has extended beyond the right to decide whether to have *a child*. See Pet. at 28-29. *Roe* explicitly rejected a woman's "to terminate her pregnancy at whatever time, in whatever way, and *for whatever reason* she alone chooses." *Roe*, 410 U.S. at 153 (emphasis added). On that foundation, *Casey* found three core *Roe* ideas:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the *State has legitimate interests from the outset of the*

> *pregnancy in protecting the health of the woman and the life of the fetus that may become a child.*

Casey, 505 U.S. at 846 (emphasis added). Absent there – and in this Court's other abortion cases – is a holding extending the *Roe-Casey* right to abortions for *any reason*.

Before this Court – or any court – hears a party's claim to expand the *Roe-Casey* right to this brave new world, *amicus* EFELDF respectfully submits that the Court should assure itself that the plaintiff has a case or controversy, U.S. CONST. art. III, §2, meeting both constitutional and prudential tests for constitutional litigation. While the Court can count on Planned Parenthood to argue for abortion on demand, it has not been established that the actual third-party rights holders want their *Roe-Casey* rights pressed here[4] or that the rights holders themselves have an Article III case or controversy. Moreover, these threshold issues all are a *plaintiff's* burden, *Renne v. Geary*, 501 U.S. 312, 316 (1991) ("[w]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record") (interior quotations omitted). *Amicus* EFELDF respectfully submits that the eugenics challenge here should be dismissed for

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[4] For example, the predominantly Asian women reportedly seeking sex-selected abortions may be coerced into that position by the same culture that asks them to abort female children. Not only reviewing courts but also the opposing state defendants – which, unlike Planned Parenthood, has *parens patrie* standing for these women, *Mills v. Rogers*, 457 U.S. 291, 297-98 (1982) – should assure themselves that *Roe-Casey* rights are voluntarily and truly invoked.

lack of an Article III case or controversy, as well as on prudential, third-party-standing grounds.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

November 15, 2018

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No. 18-483

In the Supreme Court of the United States

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF ETHICS AND RELIGIOUS LIBERTY COMISSSION OF THE SOUTHERN BAPTIST CONVENTION, NATIONAL ASSOCIATION OF EVANGELICALS, CONCERNED WOMEN FOR AMERICA, NATIONAL LEGAL FOUNDATION, AND PACIFIC JUSTICE INSTITUTE

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INTERESTS OF *AMICI CURIAE*[1]

The **Ethics and Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 50,000 churches and 15.8 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Scripture teaches that every person is an image-bearer of God and that the womb is his domain. SBC members believe God's knowledge of unborn life even precedes the creative act of conception. Therefore, abortion is incongruent with SBC beliefs. The ERLC is committed to upholding the freedom of Christian ministries who care for women in unplanned pregnancies because we believe mothers and their unborn children are known and loved by God.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social-service charities, colleges, seminaries, and independent churches. NAE

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[1] Pursuant to Supreme Court Rule 37, all Parties have received timely notice of intent to the file this brief and have consented to its filing. No Party or Party's Counsel authored this Brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amici Curiae*, their members or their Counsel, contributed money that was intended to fund the preparation or submission of this Brief.

serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred because made in the image of God, that civil government has no higher duty than to protect human life, and that duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to the intrinsic value of every human life from conception to natural death, including the life and wellbeing of every woman in America.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties, including our First Freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Indiana, are vitally concerned with the outcome of this case because of its effect on the speech and assembly rights of charitable and religious organizations and people of faith, especially with respect to supporting contentious issues like abortion and laws regulating it.

The **Pacific Justice Institute** (PJI) is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. Such includes those who, as a matter of conscience, hold the view that each individual is of great value. To this end, PJI has engaged in extensive litigation involving the sanctity of life, including high profile cases involving end of life issues.

SUMMARY OF ARGUMENT

The States have compelling interests in preventing discrimination based on sex, race, and disability, even when individuals are otherwise exercising constitutional rights such as the right to contract and, in this instance, the right to abort. The Seventh Circuit thought this Court's abortion precedent, even though that precedent has never directly addressed the issue presented by the statute under review, holds that the abortion right overrides all others. That grievous error, which allows unborn children to be killed because of their sex or race or disability, should be corrected as soon as possible. This case also presents a suitable vehicle for considering whether *Roe* and *Casey* should be reevaluated and overruled, in whole or in part.

ARGUMENT

I. This Court Has Not Already Adjudicated the Acceptability of Preventing Discrimination on the Basis of Sex, Race, and Disability in Abortion, and the States Have Compelling Interests in Preventing It.

The Seventh Circuit panel overread this Court's prior abortion decisions when it held that prohibitions against discrimination based on sex, race, and disability of the unborn child were foreclosed. Each of these categories involve important interests, and those interests can and must be harmonized with the right to abortion.

A. Sex-selection Discrimination Against Females Is Real, and the States Have a Compelling Interest in Preventing It.

States have a compelling interest to prevent abortion from being used as a tool to discriminate against females. Several states have outlawed abortions whose motivation is sex discrimination,[2]

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[2] As reported by the Guttmacher Institute, ten states (Arizona, Arkansas, Illinois, Indiana, Kansas, North Carolina, North Dakota, Oklahoma, Pennsylvania, and South Dakota) currently have laws that ban abortions for reason of sex selection at some point in pregnancy. https://www.guttmacher.org/print/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly. The law in Arkansas has been preliminarily enjoined and is the subject of ongoing litigation. *See Hopkins v. Jegley*, No. 4:17–cv–00404, 2017 WL 3220445

and social science studies have shown that parents, when limiting the size of their families, often prefer one sex over another, normally male.[3] The most prominent example is China, where abortion has been officially encouraged, even mandated, as part of its one-child policy (more recently modified to a two-child limit).[4] The result of that policy has been a significant skewing of the gender composition of China's population toward males.[5] That, in turn, has had adverse consequences for its society at large.[6]

(E.D. Ark., July 28, 2017), *appeal filed*, No. 17-2879 (8th Cir., Aug. 28, 2017). The law of Illinois has been permanently enjoined.

[3] "If Americans could have only one child, they would prefer that it be a boy rather than a girl, by a 40% to 28% margin, with the rest having no preference or no opinion on the matter." Frank Newport, *Americans Prefer Boys to Girls, Just as They Did in 1941*, June 23, 2011, at http://news.gallup.com/poll/148187/americans-prefer-boys-girls-1941.aspx (reporting on results of Gallup poll).

[4] China began its one-child policy in 1980, restricting most families to only one child. Beginning in late 2013, China allowed couples to have two children if one of the parents had been an only child. In October 2015, the Chinese Government announced that it would allow all couples to have no more than two children beginning in 2016. *See generally* https://www.brookings.edu/articles/the-end-of-chinas-one-child-policy/ (Mar. 30, 2016).

[5] "According to China's 2010 Census, men currently outnumber women by at least 34 million, an imbalance in large part due to China's fertility policy (known as the one-child policy) and a preference for sons." Wash. Post, Apr. 30, 2014, https://www.washingtonpost.com/news/monkey-cage/wp/2014/04/30/the-security-risks-of-chinas-abnormal-demographics/?utm_term=.5439d7504f17.

[6] "[O]ver the next 20 years in large parts of China . . . there will be a 10%–20% excess of young men. . . . It has also been

The laws and public policies of this country uniformly militate against sex discrimination.[7] States

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assumed that a combination of psychologic vulnerability and sexual frustration may lead to aggression and violence in these men. There is good empirical support for this prediction: cross-cultural evidence shows that the overwhelming majority of violent crime is perpetrated by young, unmarried, low-status males. In China . . . the sheer numbers of unmated men are a further cause for concern. Because they may lack a stake in the existing social order, it is feared that they will become bound together in an outcast culture, turning to antisocial behavior and organized crime, thereby threatening societal stability and security. . . ." Therese Hesketh, *et al.*, *The consequences of son preference and sex-selective abortion in China and other Asian countries*, *Canadian Med. Ass'n J.*, 2011 Sep. 6; 183(12): 1374–1377, at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3168620/ (footnotes omitted). "The crime rate has almost doubled in China during the past 20 years of rising sex ratios. . . . A study into whether these things were connected [*Sex ratios and crime: evidence from China's one-child policy*, by Lena Edlund, *et al.*, Institute for the Study of Labour, Bonn. Discussion Paper 3214] concluded that they were, and that higher sex ratios accounted for about one-seventh of the rise in crime." *The worldwide war on baby girls*, Mar. 4, 2010, at http://www.economist.com/node/15636231.

[7] *See, e.g.*, Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e *et seq.* (prohibiting employment discrimination based on sex); Title IX of the Educ. Amends. of 1972, *as amended*, 20 U.S.C. §§ 1681 *et seq.* (prohibiting sex discrimination in education programs or activities that receive federal financial assistance); Cal. Fair Emp't and Hous. Act, Cal. Gov't Code §§ 12900 *et seq.* (making it illegal for employers of five or more employees to discriminate against job applicants and employees on the basis of sex).

can legitimately regard it a compelling interest to protect against this discrimination against females by, for example, requiring a doctor to inform women that abortion is impermissible when the sex of the fetus is the motivating cause.[8]

B. Racial Discrimination in Abortion Is Real, and the States Have a Compelling Interest in Preventing It.

It needs no argument that prevention of racial discrimination is one of the interests our Republic holds most dear.[9] Indeed, the Civil War Amendments

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[8] For example, Arizona bans sex-selection abortions and requires both doctor and patient to sign an affidavit stating that the unborn child is not being aborted because of her or his sex or race. Ariz. HB2443, § 2 (2011), at https://www.azleg.gov/legtext /50leg/1r/bills/ hb2443p.pdf. As Arizona's prohibition of race as a motivation for abortion indicates, the disparity between abortion rates among the races also raises serious concerns that can legitimately be taken into account by a State. The most recent "Abortion Surveillance" report (for the year 2014) from the Centers for Disease Control and Prevention indicates that non-Hispanic black women have the highest abortion rate (26.7 abortions per 1,000 women aged 15–44 years) and ratio (391 abortions per 1,000 live births), both significantly higher than that for non-Hispanic white women. The CDC reports that non-Hispanic white women are the category with the lowest abortion rate (7.5 abortions per 1,000 women aged 15–44 years) and the lowest ratio (121 abortions per 1,000 live births). CDC, *Surveillance Summaries* 66(24);1–48, Nov. 24, 2017, at https://www.cdc.gov/mmwr/volumes/66/ss/ss6624a1.htm?s_cid=ss6624a1_w.

[9] *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

and the Civil Rights Acts of the 1860s and 1870s and the 1960s and 1970s voice that loud and clear.

It is ironic, then, that the Seventh Circuit has interpreted the Fourteenth Amendment, which was passed in large part to stamp out racial discrimination, to be in conflict with itself. It has ruled that the right to abort, which this Court has found springs implicitly from the Fourteenth Amendment, always trumps a right against racial discrimination which directly flows from it. The concurring judge below noted the irony of this fact,[10] but incorrectly believed this Court's precedent tied the court's hands to harmonize, or even balance, the two rights when in competition.[11] This Court should

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[10] In the Court of Appeals below, Judge Manion, concurring in part and dissenting in part, noted the following:

> Ranking member of the Senate Judiciary Committee Dianne Feinstein has often referred to *Roe* as 'super-precedent.' Of course, there's no such thing as 'super-precedent'—any case may be overruled by five Supreme Court Justices. But while *Roe* isn't super-precedent, it did spawn a body of jurisprudence that has made abortion the only true 'super-right' protected by the federal courts today. The purported right to an abortion before viability is the *only* one that may not be infringed even for the very best reason. For an unenumerated right judicially created just 45 years ago, that is astounding. . . . That today's outcome is compelled begs for the Supreme Court to reconsider *Roe* and *Casey*. But assuming the Court is not prepared to overrule those cases, it is at least time to downgrade abortion to the same status as actual constitutional rights.

888 F.3d at 311-313 (Manion, J., concurring and dissenting) (footnote omitted).

[11] Judge Manion below further noted "that Supreme Court

clarify on this important point.

C. Eugenics Is Real, and the States Have a Compelling Interest in Preventing It.

The eugenics movement lost much of its steam after it had been practiced so efficiently by the Nazis in Europe.[12] But it has come roaring back with abortion, both in Europe and in our own country. Indiana effectively demonstrates that with many statistics in its Petition with respect to those tested for Down Syndrome in utero.[13]

The eugenic practice of aborting children who are tested for potential genetic abnormalities is growing as such testing becomes cheaper and more widely available. Along with it, the cases of false positives for both genetic and physical pre-birth testing could be multiplied. This Court should not

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precedent compels us to invalidate Indiana's attempt to protect unborn children from being aborted solely because of their race, sex, or disability. That a narrowly drawn statute meant to protect especially vulnerable unborn children cannot survive scrutiny under [*Casey*] is regrettable." *Id.* at 310 (footnote omitted).

[12] *See Atkins v. Va.*, 536 U.S. 304 (2002) (finding imposition of death penalty on the mentally handicapped to be cruel and unusual). *But see Buck v. Bell*, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles is enough.").

[13] *See also* David Harsanyi, *Pro-Choicers Should Explain Why They Think Eugenics Is Acceptable-Iceland's 'Eradication' of Down Syndrome Raises Inconvenient Questions. At least, It Should*," Aug. 16, 2017, at http://thefederalist.com/2017/08/16/icelands-eradication-syndrome-raises-inconvenient-questions-pro-choicers/.

delay in reconciling the compelling interest in protecting the disabled with its previous decisions finding a right to abort.

II. This Case Provides an Appropriate Vehicle to Consider Whether Roe and Its Progeny Should Be Reevaluated and Overruled, in Whole or in Part.

The curtain has long ago been pulled back on *Roe* and its mid-course correction in *Casey*, exposing the historical and logical deficiencies of those decisions.[14] Although the Commissioner of the Department of Health is correct that this Petition could be granted and the Seventh Circuit's decision could be reversed without overruling *Roe* and *Casey*, this case provides an appropriate vehicle to consider whether overruling them, in whole or in part, is the better course of action. Either course of action would be available to this Court based on the Question Presented.

A recent article in the *The Georgetown Journal of Law and Public Policy* catalogues those failings in the template provided by this Court in determining whether to overrule its own precedent,[15] and *Roe* and *Casey* tick every box: (1) they are not settled

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[14] *See, e.g.*, Joseph W. Dellapenna, Dispelling the Myths of Abortion History (2006); Clarke Forsythe & Stephen Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 Tex. Rev. of Law & Pol. 301, 313–16.

[15] *See, e.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

precedent; (2) the original decisions were "wrongly decided," with neither being "well-reasoned"; (3) the schema they set out are not workable, but, rather, have caused confusion and conflict in the lower courts; (4) factual changes have eroded the original decisions; (5) legal changes have eroded the original decisions; and (6) reliance interests are not substantial.[16]

CONCLUSION

The Petition should be granted. It presents foundationally important questions about abortion and how the right to abortion can be harmonized with our Nation's compelling interests in preventing discrimination based on race, sex, and mental disability. The Court should also consider whether it should overrule its prior decisions in *Roe* and *Casey*, in whole or in part.

Respectfully submitted this
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[16] Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 Geo. J. of L. & Pub. Policy 445 (2018).

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No. 18-483

In The Supreme Court of the United States

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v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* FONDATION JEROME LEJEUNE, SAVING DOWN SYNDROME, AND DOWN PRIDE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether this Court's abortion jurisprudence was erroneously broadened by the lower court to strip States of their compelling interest in disfavoring disability discrimination and eugenics by prohibiting abortions motivated solely by a human being's disability, race, or sex.

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INTEREST OF *AMICI CURIAE*[1]

Amici include the following public interest organizations:

The **Fondation Jérôme Lejeune** is an international public interest organization, whose mission is to provide research, care, and advocacy to benefit individuals with genetic disabilities. It continues the work of Professor Jérôme Lejeune, who discovered the genetic basis of Down syndrome.

Saving Down Syndrome is a public interest group that addresses government-sanctioned prenatal screening for selective abortion. It successfully secured changes to the national prenatal screening program in New Zealand and is working with the Human Rights Commission to advance its work in nations around the world, including the United Kingdom-based "Don't Screen Us Out" campaign.

Down Pride, along with **Fondation Jérôme Lejeune**, has initiated "Stop Discriminating Down," a campaign and petition in 12 languages aimed at alerting human rights officials about the effects of prenatal testing on the population with Down syndrome.

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[1] This brief is filed with the consent of all parties. No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than *amici curiae* or their counsel contributed money intended to fund preparing or submitting this brief. The parties received notice of this filing.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Seventh Circuit erred in categorically holding that a State may not prohibit discriminatory abortions before viability. *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health,* 888 F.3d 300 (7th Cir. 2018) opinion (affirming *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health,* 265 F. Supp. 3d 859 (S.D. Ind. 2017)). This case is not about a general right to an abortion, as was the issue in *Roe* and *Casey*. Here, different and compelling state interests are at issue such that a new weighing is merited by this Court. This weighing must consider the state's interests against discrimination; that such interest is meaningful only if it exists from the outset of pregnancy; and, finally, that an erosion of that interest could lead to the slippery slope of post-natal eugenics.

Section I distinguishes the two interests addressed by this Court in its *Roe* and *Casey* decisions (namely, fetal life and maternal health), and establishes that Indiana's Nondiscrimination Law embodies the state's different and compelling interest in protecting vulnerable Down syndrome and minority communities from discrimination – an interest of no small import that deserves to be addressed and balanced by this Court on its own terms.

Section II sets forth the unique timing and duration of state interests versus the abortion right. The government interest in prohibiting discrimination based on disabilities or other immutable traits must

logically exist from the outset of that individual's life or not at all. Indiana's interest against disability discrimination exists from the outset of pregnancy, consistent with other state interests recognized as existing from pregnancy's outset in *Gonzales v. Carhart*, where this Court upheld the federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, even as applied to abortions performed before viability. 550 U.S. 124 (2007). If left standing, the Seventh Circuit's broadened characterization of the abortion right as "categorical" before viability erodes both the government interest in preventing disability discrimination, as well as eroding the state's recognized interests in the ethics and integrity of the medical profession. 888 F.3d at 308.

Section III concludes by addressing the additional government interest in drawing a clear boundary against eugenics *after* the birth of a child with disabilities or even during the child's juvenile years – an abhorrent practice that is promoted by some academics, and which is currently being practiced on juveniles under the laws of the government of Belgium. Henry Samuel, *Belgium authorized euthanasia of a terminally ill nine and 11-year-old in youngest cases worldwide*, THE TELEGRAPH, Aug. 7, 2018.

The use of abortion to end the life of human beings who are prenatally determined to have Down syndrome is well-documented, as briefly set forth at the outset of *amici*'s argument. *Amici* urge this Court to grant certiorari to address the profound societal consequences of its jurisprudence being broadened to give

constitutional protection to the eugenic practice of killing unborn human beings[2] based on disability or other discrimination.[3]

REASONS FOR GRANTING CERTIORARI

The use of abortion to kill human beings[4] who are prenatally determined to have Down syndrome is well-documented: A systematic review of U.S. abortion

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[2] *See* n. 4, *infra*. Since this Court's *Roe* decision in 1973, science's understanding of embryology has exploded exponentially. This Court's analysis of the state interests relevant to human beings determined to have disabilities or other immutable traits via cutting-edge prenatal testing techniques should not be limited by 45-year-old science.

[3] As organizations in the care and service of individuals with Down syndrome, *amici* bring this Court's attention to the lower court's broadened right to prenatal *disability* discrimination. While not specifically addressed in this brief, the same arguments apply equally to prenatal discrimination on the basis of the immutable characteristics of race and sex.

[4] This Court has recognized that in abortion, "the fetus will be killed." *Gonzalez v. Carhart*, 550 U.S. 124, 159 (2007). Science also establishes that the fetus is a human being from the moment of fertilization. *See* Keith L. Moore, *Before We Are Born: Essentials of Embryology* 2 (Saunders ed., 7th ed. 2008) ("[The zygote], formed by the union of an oocyte and a sperm, is the beginning of a new human being."); ML Condic, *The Origin of Human Life at Fertilization: Quotes Compiled from Medical Textbooks and Peer-Reviewed Scientific Literature* (Nov. 2017) (compiling sixty-one short quotes from medical school textbooks and peer-reviewed scientific journals published since 2001 identifying sperm-egg fusion as the beginning of a new individual human life), *available at* http://bdfund.org/wp-content/uploads/2016/05/Condic-Sources-Embryology.pdf. (Last visited Nov. 13, 2018.)

prevalence after a prenatal diagnosis of Down syndrome revealed alarmingly high rates of over 85% among nine hospital-based studies.[5] In one anonymous survey of nearly 500 physicians who deliver a variety of prenatal diagnoses, 23% of them admitted that they urged termination of disabled unborn children.[6] A Stanford study from 2014 reported that mothers of children with Down syndrome "commonly expressed" that the medical information they had received in prenatal counseling was "biased or overly negative."[7]

I. THE ABORTION NONDISCRIMINATION LAW ADVANCES THE STATE OF INDIANA'S INTEREST IN PREVENTING DISABILITY DISCRIMINATION – AN INTEREST NEVER BEFORE ADDRESSED BY THIS COURT.

Contrary to the overreaching decision of the lower court, *Roe v. Wade*, 410 U.S. 113 (1973) did not create an inexorably absolute and categorical right to abortion without any regard for anti-discrimination principles.

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[5] Jaime L. Natoli, et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995-2011)*, 32:2 Prenatal Diagnosis 142 (Feb. 2012). See also Lord, A., *University Professor Supports Killing Disabled Babies: "Time to Support Eugenic Abortion,"* LifeNews (01/04/2018).

[6] Wertz DC, *Drawing lines: notes for policymakers* (In: Parens E, Asch A, eds. *Prenatal Testing and Disability Rights*, Washington, DC: Georgetown University Press, 261-287 (2000)).

[7] Gregory Kellogg, et al., *Attitudes of Mothers of Children with Down Syndrome Towards Noninvasive Prenatal Testing*, 23 J. Gent. Counsel 805, 810 (2014).

Roe itself separately balanced each of two distinct state interests against a general right to privacy. *Id.* at 153, 162-63. The only two state interests addressed by *Roe* were the interests in (1) "preserving and protecting the health of the pregnant woman" and (2) "protecting the potentiality of human life." 410 U.S. at 162.

Yet, the Seventh Circuit implicitly and erroneously presumes – without any significant reflection, analysis, or citation of authority – that there exists a constitutional right to abort an unborn child because of his or her sex, race, or disability. But no decision of this Court has ever held that States are powerless to prevent abortions systemically targeting individuals prenatally identified to have certain immutable traits.

On the contrary, "[i]t is important to make the distinction between a pregnant woman who chooses to terminate the pregnancy because she doesn't want to be pregnant, versus a pregnant woman who wanted to be pregnant, but rejects a particular fetus. . . ."[8] Picking and choosing among particular children raises the specter of abortion as "a wedge into the 'quality control' of all humans. If a condition (like Down syndrome) is unacceptable, how long will it be before experts use selective abortion to manipulate – eliminate or enhance – other (presumed genetic) socially charged

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[8] *See* Marsha Saxton, *Disability Rights and Selective Abortion*, Abortion Wars, A Half Century of Struggle: 1950 to 2000 (Univ. of Cal. Press, 1998), *available at* http://gjga.org/conference.asp?action=item&source=documents&id=17 (last visited Nov. 13, 2018).

characteristics: sexual orientation, race, attractiveness, height, intelligence?"[9]

Perhaps for these reasons, this Court has never endorsed a right to abort children solely because they have been identified prenatally to have a genetic abnormality or disability, or to be of a particular race or sex. In *Planned Parenthood v. Casey*, the Supreme Court, quoting approvingly from its statement in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), declared that the abortion liberty pertained to "the decision whether to bear or beget *a* child," *Casey*, 505 U.S. at 851. The Court has never framed the constitutionally protected abortion decision as whether to bear or abort a *particular* child based on his or her sex, race, or disability.

Notably, there is persuasive authority from the U.S. Courts of Appeals for the Federal Circuit against abortions based on disability – even where the fetal anomaly was lethal as excluded by the statute at issue in this case. In *Britell v. United States*, 372 F.3d 1370 (Fed. Cir. 2004), the court considered an equal protection challenge to a restriction on the use of Department of Defense funds for abortion. *Id.* at 1372. The plaintiffs in *Britell* were parents of an unborn child diagnosed with a lethal fetal anomaly. They elected to abort the child, then later filed suit when the Department of Defense denied their request for reimbursement for the cost of the abortion. *Id.* The plaintiffs contended that there was no rational basis to apply the funding

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[9] *Id.*

restriction to their case, arguing that the government's interest in "potential human life" did not extend to the life of an anencephalic unborn child. *Id.* at 1372, 1374.

The Federal Circuit rejected this argument, concluding that the funding restriction was rationally related to the government's legitimate interest in "the protection and promotion of potential human life." [10] *Id.* at 1380. In reaching its decision, the court explicitly considered and rejected the notion that lesser value could be assigned to an anencephalic unborn child:

> For us to hold, as Britell urges, that in some circumstances a birth defect or fetal abnormality is so severe as to remove the state's interest in potential human life would require this court to engage in line-drawing of the most non-judicial and daunting nature. This we will not do. . . . It is not the role of courts to draw lines as to which fetal abnormalities or birth defects are so severe as to negate the state's otherwise legitimate interest in the fetus's potential life. . . .

Id. at 1383.

As *Britell* explicitly recognized, Indiana likewise has an interest in protecting the lives of children identified to have disabilities or genetic variations – an interest that is different from the interests addressed in *Roe* and *Casey*. Further, the rationale in *Britell*

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[10] This Court has since abandoned its former use of the phrase "potential human life," in light of the science of human embryology. In *Gonzales v. Carhart*, the majority frequently referred to "fetal life," or the "life of the fetus." 550 U.S. 124 (2007).

logically extends to the protection of unborn children targeted for abortion based on their race or sex.

Indiana's interest in preventing disability and other discrimination is distinct, compelling and consistent with established societal norms as embodied in federal and state statutes. Under the Americans with Disabilities Act of 1990 ("ADA"),[11] the United States prohibits discrimination against persons with physical or mental disabilities in various circumstances, including employment, public services and accommodations, public transportation, and telecommunications. State laws provide similar protections. *See, e.g.*, IND. CODE §§ 22-9-5, *et seq.* (Employment Discrimination Against Disabled Persons). Reflecting these non-discriminatory principles, North Dakota became the first state to ban pre-viability abortions based solely on an unborn child's disability. N.D. CENT. CODE § 14-02.1-04.1 (2018) (ban enacted in 2013). Nondiscrimination laws that likewise protect unborn human beings with disabilities or other immutable traits from the beginning of their lives were enacted in Indiana in 2016, HEA 1337 (2016), followed by Ohio in 2017, OHIO REV. CODE §§ 2919.10, 2919.101 and 3701.79 (2017).[12]

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[11] 42 U.S.C. §§ 12101, *et seq.* and the ADA Amendments Act of 2008, Pub.L. 110-325, 122 Stat. 3553, *et seq.* (2008).

[12] For an outstanding analysis of the distinct state interests outside of *Roe* and *Casey*, embodied in the Ohio statute and by extension the Indiana statute, *see* Reply Brief of Defendants-Appellants Lance Himes, Kim G. Rothermel, and Bruce R. Saferin, *Pre-Term Cleveland v. Himes*, No. 18-3329, Document 45 (6th Cir. 2018) (filed 9/19/2018).

Over the last century, we have witnessed a dramatic shift in attitudes toward individuals with disabilities. For instance, there is a sharp contrast between Justice Holmes's notorious dictum in *Buck v. Bell*, 274 U.S. 200 (1927), and the Congressional findings in the Preface to the ADA, 42 U.S.C. § 12101. In *Buck v. Bell*, this Court approved, by an 8-1 vote, the compulsory sterilization of a "feeble minded" woman who had been adjudged "the probable potential parent of socially inadequate offspring." *Id.* at 205, 207 (Holmes, J.). In so doing, the Court shamefully declared, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." *Id.* at 207.

Sixty-three years later, in a dramatic reversal of societal mores, the U.S. Congress, in the ADA, found that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination . . . ," 42 U.S.C. § 12101(a). No longer viewed as "imbeciles" who are "manifestly unfit," 274 U.S. at 207, people with mental and physical disabilities have the right to "fully participate in all aspects of society" – including birth itself. 42 U.S.C. § 12101(a)(1).

Even individuals who advocate for abortion rights have expressed discomfort and dismay at the use of

"disability selective" abortion.[13] Indeed, "many [supporters of abortion rights] are finding that, while they support a woman's right to have an abortion if she does not want to have a baby, they are less comfortable when abortion is used by women who don't want to have a particular baby."[14]

Recognition of the equal dignity of the people with disabilities has led to an emerging sense of disquiet about the widespread practice of disability selective abortion. Alert commentators have raised serious questions about the practice of prenatal screening for fetal disabilities and subsequent abortion. *See* Harmon, *Genetic Testing + Abortion = ???*, *supra*; Saxton, *Disability Rights and Selective Abortion*, *supra*. In particular, giving constitutional protection to this practice risks eliminating entire communities of people with disabilities, despite the fact that our nation recognizes that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society." 42 U.S.C. § 12101(a)(1).

Growing legal consensus condemns both sex-selection and disability selective abortions and acknowledges that legal safeguards must be enacted to protect children – born and unborn. For example, the United States is a signatory to the Convention on the Rights of the Child, which states that a child "needs

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[13] Amy Harmon, *Genetic Testing + Abortion = ???*, NY TIMES, May 13, 2007, *available at* http://www.nytimes.com/2007/05/13/weekinreview/13harm.html?_r=0 (last visited Nov. 13, 2018).

[14] *Id.*

special safeguards and care, including appropriate legal protection, *before as well as after birth*." Preamble to Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added).

More recently, the U.N. Committee on the Rights of Persons with Disabilities (CRPD), declared that "[l]aws which explicitly allow for abortion on grounds of impairment violate the Convention on the Rights of Persons with Disabilities." CRPD also rejected the "incompatible with life" label often used to describe prenatal diagnoses of genetic abnormalities or disabilities, noting "experience shows that assessments on impairment conditions are often false,"[15] and that, even if the diagnosis is correct, the label "perpetuates notions of stereotyping disability as incompatible with a good life."[16]

II. ERADICATING DISCRIMINATION IS A STATE INTEREST THAT IS MEANINGFUL ONLY IF IT EXISTS FROM THE OUTSET OF PREGNANCY

The government interest in prohibiting discrimination based on disabilities or other immutable traits must logically exist from the outset of that individual's life or not at all. In other words, Indiana's interest

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[15] *See, e.g.*, Susan Yoshihara, *Another U.N. Committee Says Abortion May Be a Right, But Not on Basis of Disability*, C-FAM, Center for Family and Human Rights, Oct. 26, 2017, *available at* https://c-fam.org/friday_fax/another-un-committee-says-abortion-may-right-not-basis-disability/ (last visited Nov. 13, 2018).

[16] *Id.*

against disability discrimination is meaningful only if it exists as strongly from the outset of pregnancy as it does after birth and into the ongoing life of the individual human being. This logic is consistent with other state interests recognized as existing from pregnancy's outset, such as the state's interest in the ethics and integrity of the medical profession discussed in *Gonzales v. Carhart*, where this Court upheld the federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, even as applied to abortions performed before viability. 550 U.S. 124 (2007).

Carefully read, *Gonzales* stands for the proposition that governments have varying interests even *before viability* and that different interests implicate different durational points – with some interests beginning at the outset of pregnancy, and others being implicated upon a determination of fetal viability.[17]

Yet, the Seventh Circuit failed to recognize that this Court's *Gonzales* decision upheld the ban on partial birth abortion even *before* fetal viability. The reasoning of the *Gonzales* decision gives strong support for the argument that Indiana's Nondiscrimination Law embodies its significant "governmental interest in eradicating disability discrimination" from the outset of pregnancy.[18]

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[17] Randy Beck, *State Interests and the Duration of Abortion Rights*, 44 McGeorge Law Rev. 31 (2013).

[18] Messner, TM, *The Constitutional Viability of Five Month Abortion Laws*, 9 Charlotte Lozier Institute: On Point 4 (2015) (citing Beck, *supra*, n. 17).

If left standing, the Seventh Circuit's broadened characterization of the abortion right as "categorical" before viability erodes both the government interest in preventing disability discrimination, as well as eroding the state's recognized interests in the ethics and integrity of the medical profession.

This point emphasizes that this petition presents a federal question of the highest importance. Indeed, such legislation and the duration of its competing interests is outside the paradigm contemplated by the Court when it issued its abortion decisions decades ago.

The paradigm assumed by this Court's abortion jurisprudence is that the woman is experiencing an unwelcomed pregnancy, *i.e.*, that she does not desire to be pregnant under any circumstances. In fact, this Court's case law speaks of a decision "whether to bear or beget a child" – not a *particular* child. *Roe v. Wade*, 410 U.S. 113, 169 (1973). Likewise, this Court's *Casey* decision addressed a woman's decision "whether to terminate her *pregnancy*," and not whether to terminate the life of a particular *child* with particular traits. *Planned Parenthood v. Casey*, 505 U.S. 833, 875 (1992).

How different the situation when a pregnancy is desired until prenatal testing determines that the child has a genetic condition such as Down syndrome. The unborn child, who was initially welcomed and celebrated, is now marked for abortion (in some cases due to pressure from physicians) because he or she has a disability.

This practice amounts to disability discrimination, and crosses a line into eugenics. The State's interest against disability discrimination and eugenics were never contemplated by *Roe* and *Casey*, yet the lower court stretched those decisions beyond recognition to override the state's interests against discrimination with no guidance from this Court.

If left standing, our nation's professed government interest in the inherent value of individuals with disabilities, expressed in instruments such as the Americans with Disabilities Act, *infra*, n. 11, will be betrayed and belied. Targeting a class of human beings for death simply because they have been discovered to have Down syndrome or another immutable characteristic before birth or after birth goes against all that civilized society should stand for. The Indiana bill embodies the overriding and compelling government interest from the outset of an individual's life in disfavoring the eugenic elimination of an entire class of human beings.

III. THE ABORTION NONDISCRIMINATION LAW PROMOTES INDIANA'S INTEREST IN DRAWING A CLEAR BOUNDARY AGAINST THE PRACTICE OF POSTNATAL EUGENICS.

The Abortion Nondiscrimination Act also serves the legitimate interest of drawing a clear boundary against the practice of postnatal eugenic infanticide. "This Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life . . . *Glucksberg* found reasonable the

State's 'fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia.'" *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 732-735 (1997)).

The concern about the advent of eugenic infanticide is not merely hypothetical. For example, Professor Peter Singer, who holds an endowed chair at Princeton University, has offered a public justification for infanticide, based on his position that "[i]f the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either, and the life of a newborn baby is of less value to it than the life of a pig, a dog, or a chimpanzee is to the nonhuman animal." Peter Singer, Practical Ethics 169 (2d ed., CAMBRIDGE UNIV. PRESS 1997); *see also, e.g.*, H. Kuhse & P. Singer, Should the Baby Live? The Problem of Handicapped Infants (OXFORD UNIV. PRESS 1985).

Similar proposals have been advanced by like-minded thinkers, including open advocacy for infanticide of children with Down syndrome. Alberto Giubilini & Francesca Minerva, *After-birth abortion: why should the baby live?*, JOURNAL OF MEDICAL ETHICS (Feb. 23, 2012), *available at* https://jme.bmj.com/content/39/5/261 (last visited Nov. 13, 2018) (arguing that parents of infants with disabilities such as Down syndrome should be allowed to terminate the lives of those born children, since "the same reasons which justify abortion should also justify the killing of the potential person when it is at the stage of a newborn").

And beyond our nation's borders, a form of this abhorrent practice is not merely promoted by academics, but is currently being practiced on juveniles with disabilities as sanctioned by the government of Belgium. Henry Samuel, *Belgium authorized euthanasia of a terminally ill nine and 11-year-old in youngest cases worldwide*, THE TELEGRAPH, Aug. 7, 2018. While the article indicates that the nine-year-old had a brain tumor, and the 11-year-old had cystic fibrosis, the Belgium report did not indicate the prognosis if the children were given medical treatment. The article also reported on a 17-year-old who "chose to die" because of his muscular dystrophy.

The State of Indiana has every right to choose to draw a clear boundary against the adoption of such practices. The Abortion Nondiscrimination Act "draw[s] boundaries to prevent certain practices that extinguish life and are close to actions that are condemned," such as discriminatory abortion and eugenics. *Gonzales v. Carhart*, 550 U.S. at 158.

CONCLUSION

For these reasons, *Amici* Down syndrome organizations urge this Court to grant Indiana's petition for writ of certiorari.

Respectfully submitted,

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In the
Supreme Court of the United States

KRISTINA BOX, COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *ET AL.*,
Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF *AMICA CURIAE* BEVERLY MCMILLAN, M.D., IN SUPPORT OF KRISTINA BOX, COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, ET AL.

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INTEREST OF AMICA[1]

Amica Beverly McMillan, M.D., is a physician who, before deciding to stop providing abortions, experienced firsthand the impact of viewing and handling fetal remains and thereby realizing the humanity of the unborn.

In 1975, Dr. McMillan helped to open the first abortion clinic in Mississippi. As the first medical director of Family Health Services, Dr. McMillan performed abortions up to twelve weeks gestation. In 1989, Dr. McMillan recounted why she decided to stop performing abortions:

> After [an abortion procedure] was all over, I would leave my patient on the table and I would go over to the suction bottle and I would take the little stockinette out and go outside the room to a sink where I would open the stockinette up, and I personally would pick through it with a forceps and I would have to identify four extremities, and a spine and a skull and the placenta. If I didn't find that, I would have to go back in that room and scrape and suction some more, ... Standing at that sink, I guess I just started seeing these bodies

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[1] Counsel of record for the parties received timely notice of the intent to file this brief and emailed written consent to its filing. No counsel for any party authored this brief in whole or in part. No party or counsel for any party made any financial contribution toward the preparation of submission of the brief.

> for the first time. I don't know what I did before that. I think I just counted. I was cool. Blood didn't make me sick. I could handle all the guts and gore of medicine just fine. But I started seeing this for the first time and it started bothering me.
>
> I remember one afternoon in particular, a very attractive young woman who was the day-to-day manager of the clinic came up to the sink one day while I was getting ready to go through my little procedure, and she said, "Would you let me see? I've never really seen what you look at at the sink." I said, "Sure," and I started showing her. And this happened to be about a 12-week abortion, and that was about the farthest along we went. That day as I was showing her, I remember very clearly seeing an arm and seeing the deltoid muscle, and it just really struck me that day how beautiful that was. The thought just flashed through my mind, "What are you doing? Here is this beautiful piece of human flesh here, ***what are you doing***?" That was one of the very last ones that I did.[2]

SUMMARY OF THE ARGUMENT

A divided panel of the Seventh Circuit held that the State of Indiana's fetal disposition

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[2] http://www.priestsforlife.org/testimonies/1129-testimony-of-beverly-mcmillian-md-former-abortion-provider (as last visited on November 13, 2018).

regulations, requiring that fetal remains be disposed of in a manner similar to other human remains, violated substantive due process because the law was not rationally related to any legitimate government interest. The en banc panel split evenly on whether to grant a petition for rehearing, leaving the panel decision in place.

While Amica agrees with the State that its interest in the humane and dignified disposal of human remains fully justifies the fetal disposition law, they submit this brief to highlight a separate interest served by the law, namely, the interest in protecting the integrity and ethics of the medical profession.

This Court should grant the Petition and reverse the judgment of the Seventh Circuit.

ARGUMENT

THE FETAL DISPOSITION PROVISION SERVES THE GOVERNMENTAL INTEREST IN PROTECTING THE INTEGRITY AND ETHICS OF THE MEDICAL PROFESSION.

In addition to the interest in the dignified treatment of human remains, the State has another legitimate interest in the fetal disposition provision, an interest that this Court has recognized in both abortion and non-abortion contexts. "There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales v.*

Carhart, 550 U.S. 124, 157 (2007) (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 731 (1997) and citing *Barsky* v. *Board of Regents of Univ. of N. Y.*, 347 U.S. 442, 451 (1954) (State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine).

The governmental interest in protecting the integrity and the ethics of the medical profession has both an objective and a subjective component. *Gonzales*, *supra*, at 157 (acknowledging Congress' legitimate concern for the "effects on the medical community *and on its reputation* caused by the practice of partial birth abortion") (emphasis added). *See also Glucksberg*, *supra*, 521 U.S. at 731 (physician assisted suicide "is fundamentally incompatible with the physician's role as healer" and could "undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming") (internal citations omitted). Thus, the State has legitimate interests both that the medical practitioners act ethically and humanely, and that they be perceived by the public as doing so.

The fetal disposition provision clearly serves both the objective and subjective components of that interest. For the objective component, requiring doctors to distinguish, not just visually but manually, between remains of a human being and medical "waste" following an abortion procedure is likely to counteract, to some degree, the coarsening and dehumanizing effects of abortion practice.

Various instances of the dehumanizing and conscience-deadening effects of performing

abortions, particularly abortions past the first trimester, have come to light in the past few years. One example was provided by Kermit Gosnell, convicted in May 2013 of three counts of murder of children who survived abortion, and 24 counts of committing abortion past the 24-week limit. See *Whole Women's Health v. Hellerstedt*, 579 U.S. ____, 136 S.Ct. 2292, 2313-14, 2343-44 (2016) (describing Gosnell case). The grand jury report that resulted in Gosnell's indictment also recommended that he be charged with several counts of abuse of a corpse. These counts referred to Gosnell's practice of cutting off and preserving the feet of fetuses, as well as storing fetuses in cut-off milk jugs, water containers, and juice cartons. The Medical Examiner testified to the grand jury:

> But certainly things like drink containers, milk containers, water containers, this is not something we do in medical practice. . . . What I do does not deal with living patients, and I would not put something in a plastic drink container. It just – it feels wrong I guess is what I'm saying. It feels wrong.[3]

The grand jury also recommended that Pennsylvania law be amended to criminalize the mutilation of any fetal remains: "No civilized

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[3] Report of Grand Jury in No. 0009901-2008 (1st Jud. Dist. Pa., Jan. 14, 2011), p. 238, online at https://cdn.cnsnews.com/documents/Gosnell,%20Grand%20Jury%20Report.pdf (as last visited on November 6, 2018).

society can accept such an abomination, whether the fetuses in question were viable or not."[4]

Another example of the coarsening effect of disposing of fetal remains inhumanely can be found in the undercover videos published in 2015 and 2016 by the Center for Medical Progress. Various Planned Parenthood doctors were involved in procuring, for a price, fetal tissue for researchers or middlemen tissue procurement companies. That they began to view fetal remains as "line items" and commodities was evidence from recorded comments such as the following:

> *Planned Parenthood Federation of America Senior Medical Advisor (February 26, 2015):*
>
> "We've just been working with people who want particular tissues. Like a, you know, cardia--they want cardiac, or they want eyes, or they want neural. And Bill Rashbaum, back in the day at Einstein, was working with people with Parkinson's disease research, who wanted spinal cords. So I mean, that sort of thing. Certainly, everything we provide--oh, gonads. Oh my god, gonads. Everything we provide is fresh."[5]

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[4] *Id.* at 248.

[5] Center for Medical Progress, "FULL FOOTAGE: PPFA Dr. Carolyn Westhoff" (2015) at 2:44, https://www.youtube.com/watch?v=oar7sw0UtOg (as last visited on November 12, 2018).

Planned Parenthood Federation of America Senior Medical Director (July 25, 2014):

"So then you're just kind of cognizant of where you put your graspers, you try to intentionally go above and below the thorax, so that, you know, we've been very good at getting heart, lung, liver, because we know that, so I'm not gonna crush that part, I'm going to basically crush below, I'm gonna crush above, and I'm gonna see if I can get it all intact."[6]

"You know I asked her at the beginning of the day what she wanted, yesterday she wanted, she's been asking, a lot of people want intact hearts these days, they're looking for specific nodes. AV nodes, SA. I was like wow, I didn't even know, good for them. Yesterday was the first time she said people wanted lungs. And then, like I said, always as many intact livers as possible."[7]

Planned Parenthood Gulf Coast Director of Research (April 9, 2015):

"So if we alter our process and we are able to obtain intact fetal cadavers, then we can make

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[6] Center for Medical Progress, "FULL FOOTAGE: Planned Parenthood Uses Partial-Birth Abortions to Sell Baby Parts" (2015) at 29:39, https://www.youtube.com/watch?v=H4UjIM9B9KQ&t=1928s (as last visited on November 12, 2018).

[7] *Id.* at 31:00.

it part of the budget that any dissections are this, and splitting the specimens into different shipments is this, I mean, that's, it's all just a matter of line items. Knowing that this is what we plan to do. Because it almost seems wasteful at that point that if we've gone through the work, and we've got – and we're going to be sending away a liver and thymus, and we've got other parts that can be utilized."[8]

Planned Parenthood of the Rocky Mountains Medical Director and Medical Assistant (April 7, 2015):

"Medical Director: I don't know if I've ever seen a thymus, but maybe I have and I don't know that I have. I know I've seen livers; I've seen stomachs; I've seen plenty of neural – plenty of neural tissue; we usually, we can see the whole brain usually come out."[9]

"Medical Director: Here's some organs for you. They're all attached. Here's some stomach, a

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[8] Center for Medical Progress, "FULL FOOTAGE: Intact Fetuses "Just a Matter of Line Items" for Planned Parenthood TX Mega-Center" (2015) at 3:47:15, https://www.youtube.com/watch?v=MCiD9_ICt44&t=13667s (as last visited on November 12, 2018).

[9] Center for Medical Progress, "FULL FOOTAGE: Planned Parenthood VP Says Fetuses May Come Out Intact, Agrees Payments..." (2015) at 11:20, https://www.youtube.com/watch?v=wV2U9unI1NM&t=6880s (as last visited on November 12, 2018).

heart, kidney, and adrenal. I don't know what else is in there.
Medical Assistant: Tiny. Head, arms, I don't see any legs. Did you see the legs?
Medical Director: I didn't really look but . . .
Medical Assistant: Oh, look, there's – and another boy!"[10]

"Medical Assistant: Two parts and then there's arms missing.
Medical Director: But yeah, here's her head. So like, is this spinal column? Because here's her thorax. . . . Interesting.
Medical Assistant: So big.
Medical Director: And there's her heart.
Medical Assistant: And there's something over here, I don't know what this is, but that looks like an organ, too.
Medical Director: But you don't want these, right?"[11]

Medical Director, Desert Star Family Planning (October 11, 2014)

"Now the thing is I don't do inductions so, like my technique is, a disarticulation technique so, there would have, you know, we'd have to kind of talk about like exactly what it is that you were needing, because [interruption] because part of the issue is, it's not – it's just – it's a

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[10] *Id.* at 2:31:20.
[11] *Id.* at 1:54:14.

> matter of how I feel about it coming out intact. But I got to worry about my staff, and, you know, people's feelings about it coming out looking like a baby."[12]

The public was understandably outraged by the inhumanity displayed by these abortion providers. While usually hidden from public view, the providers' callousness is a logical consequence of routinely handling and disposing of the remains of fetuses whose lives they have just ended as if they were medical waste, except where particular organs could be salvaged for other uses.

Thus, it is entirely rational for a State to require that abortion providers ensure that fetal remains be disposed of in a humane and dignified manner, consistent with procedures for disposal of other human remains. For society to allow these fetal remains to be wrapped up and disposed of along with other medically tainted trash would seem to affirm the abortionists' judgment about the lack of any inherent worth in the life just ended.

As to the subjective component of the state's interest, the fetal disposition provision allows society to express to abortion providers its collective judgment that, with each abortion, the provider has ended the life of a fellow human being, in contradiction to the physician's commitment to

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[12] Center for Medical Progress, "FULL FOOTAGE: Planned Parenthood Arizona/Los Angeles/Mar Monte Dr. DeShawn Taylor" (2015) at 11:37, https://www.youtube.com/watch?v=oNCkK62UBgw&t=730s (as last visited on November 12, 2018).

healing and preserving life. The public cannot control how the provider responds to that message, but the public's interest in expressing that message is entirely rational. Moreover, in complying with the fetal disposition provisions, the abortion providers must pay tribute to the public sentiment that physicians should practice their profession with humanity and integrity.

CONCLUSION

Indiana's fetal disposition requirements are well-supported by the state's interests in the humane and dignified disposal of human remains as well as its interest in protecting the integrity and ethics of the medical profession. The Court should grant review and reverse the judgment of the Seventh Circuit.

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No. 18-483

In the Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA DEPARTMENT OF HEALTH, ET AL.,

Petitioners

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., ET AL.,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE PROLIFE CENTER AT THE UNIVERSITY OF ST. THOMAS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The Prolife Center at the University of St. Thomas seeks to promote effective legal protection for human life from the moment of fertilization to natural death through scholarly research, curriculum development, and legal initiatives. Faculty associated with the Center have provided significant *pro bono* representation to government officials, organizations and individuals supporting regulation and the eventual elimination of the practice of induced abortion.

As an academic center located in Minnesota, the Prolife Center has studied incidents resulting in passage of fetal disposition statutes similar to those at issue in *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Department of Health* ("*PPINK*"), 888 F.3d 300 (7th Cir. 2018), as well as the state interests advanced by such statutes. The Prolife Center submits this brief

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[1] As required by Rule 37.2(a), counsel of record for each party counsel of record for each party received notice of the intent to file this amicus brief on November 9 and has consented to the filing of this amicus brief. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

to provide this Court with greater insight into how fetal disposition laws advance the right of States to recognize and promote the dignity of fetal human life, and promote public health and safety.

SUMMARY OF THE ARGUMENT

Review is warranted in this case for at least two reasons. First, the Seventh Circuit's decision in *PPINK* creates a circuit conflict with the Eighth Circuit on an issue of whether statutes directing abortion clinics and medical facilities to dispose of human fetal remains by cremation or internment should be interpreted to attribute constitutional personhood, rendering all such statutes unconstitutional under *Roe v. Wade*, 410 U.S. 113 (1973). Second, the Seventh Circuit's decision creates a circuit conflict with the Eighth Circuit by requiring fetal disposition laws to override state laws recognizing a woman's right to sepulcher, the right to possess or control the disposition of fetal remains, in order to respond to a persistent problem of improper disposition of fetal remains by abortion clinics and others.

ARGUMENT

I. The Court Should Grant Certiorari Because the Circuits Are in Conflict over Whether Laws Directing the Disposition of Fetal Remains Impermissibly Attribute Constitutional Personhood to Human Fetuses.

A majority of the court below ruled that Indiana's fetal disposition law, Ind. Code §16-34-3-4, is unconstitutional under this Court's abortion jurisprudence because the state's interest undergirding the statute, "the humane and dignified disposal of human remains", creates an irrebutable presumption that aborted fetuses enjoy constitutional personhood. *PPINK*, 888 F.3d at 308.

> Such a position inherently requires a recognition that aborted fetuses are human beings, distinct from other surgical byproducts, such as tissue or organs. Indeed, in its brief, Indiana maintained that it "validly exercised its police power by making a moral and scientific judgment *that a fetus is a human being* who should be given a dignified and respectful burial and cremation." (Emphasis added).
>
> . . .

> Simply put, the law does not recognize that an aborted fetus is a person. . . . As such, the State's interest in requiring abortion providers to dispose of aborted fetuses in the same manner as human remains is not legitimate.

Id.

The reasoning of the majority is undercut both by its substitution of "person" for the state's use of the "human being" in its defense of the statute, and more importantly by the actual language of the Indiana statute.

Ind. Code §16-34-3-4(a) provides "[a]n abortion clinic or health care facility having possession of an aborted fetus shall provide for the final disposition of the aborted fetus." The phrase "aborted fetus" is consistently used to identify the dead biological entity that is the subject of the law.

The phrase "human being" is entirely absent from the statue, while the word "human" appears only as an adjective modifying the word "remains" in subsection (c). "IC 23-14-31-26, IC 23-14-55-2, IC 25-15-9-18, and IC 29-2-19-17 concerning the authorization of disposition of human remains apply to this section." Ind. Code §16-34-3-4(c).

While it is true the word "person" appears in the statute twice, it is used only to designate the individual arranging for the disposition of the "aborted fetus." Ind. Code §16-34-3-4(a)(1) provides "a *person* is not required to designate a name for the *aborted fetus* on the burial transit permit and the space for a name may remain blank", and Ind. Code §16-34-3-4(b) states "[t]he local health officer shall issue a permit for the disposition of the *aborted fetus* to the *person* in charge of interment for the interment of the aborted fetus."

This analysis of the statutory language reveals the linguistic leaps required to render the lower court's ruling of unconstitutionality. That the ruling is a result in search of a rationale becomes even more apparent when compared with the language of the Minnesota statute upheld in *Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479 (8th Cir. 1990).

In that case, Planned Parenthood of Minnesota sought to enjoin the enforcement of a fetal disposition law on the bases that the statute was vague and violated the substantive due process rights of women seeking abortions.

Unlike the Indiana statute at issue in this case, which does not use the phrase "human being," the Minnesota statute forthrightly declares that fetal

remains are "the remains of the *dead offspring of a human being . . .*" 910 F.2d at 481 (providing text of Minn. Stat. § 145.1621 (1988) (emphasis added).[2]

Planned Parenthood of Minnesota, as part of its substantive due process claim, argued that the statute implicitly equated abortion with murder, thereby creating a psychological burden for women obtaining abortions. The appellate court summarily dismissed this claim and ultimately upheld the constitutionality of the statute. 910 F.2d at 487-88.

The Seventh Circuit opinion below distinguishes the Minnesota case as vindicating only those fetal disposition laws that are passed for the protection of public sensibilities, while the court characterizes the Indiana statute as focusing on the fetus. 888 F.3d at 309. Unlike the Minnesota statute, the Indiana statute has no purpose provision so it is difficult to determine the basis of the lower court's conclusion that the Indiana statute is unconcerned with protection of public sensibilities.

It is equally difficult to discern why the Seventh Circuit majority characterizes the Minnesota statute as exclusively supported by the state's

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[2] Like the Indiana statute, the word "person" appears in the Minnesota statute but only in a context that logically precludes the word including the aborted fetus. 910 F.2d at 481 (quoting Minn. Stat. § 145.1621(subd. 5) (1988).

interest in public sensibilities. While protection of public sensibilities was one of the state's interests identified in the statute, other interests are identified as well. The stated object of the statute was to require "the dignified and sanitary disposition of the remains of aborted or miscarried human fetuses . . ." 910 F.2d at 481 (quoting Minn. Stat. § 145.1621(subd. 1). By requiring the disposition be dignified, the Minnesota law appears to be focusing on the fetus, as much as the public. Black's Law Dictionary defines dignity as "[t]he quality, state, or condition of being noble; the quality, state, or condition of being dignified." *Dignity, Black's Law Dictionary* (10th ed. 2014).

Applying the Seventh Circuit's linguistic analysis to the Minnesota statute, the opinion would read something like this:

> The statute identifies remains of a human fetus as the "remains of the dead offspring of a human beings", distinct from other surgical byproducts, such as tissue or organs. Indeed, in the stated purpose of the statute, Minnesota requires that aborted human fetuses be provided dignified disposition. Doing so imputes worth to the human fetus. Yet under Supreme Court jurisprudence the law does not recognize that an aborted fetus is a person. . . . As

> such, the State's interest in requiring abortion providers to dispose of the remains aborted fetuses in the same manner as the remains of human persons is not legitimate.

Such a ruling would ignore this Court's repeated recognition of a state's right to "use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

Assuming the Seventh Circuit had utilized an updated version of the constitutional analysis employed by the Eighth Circuit, the result would be that of Judge Manion's dissenting opinion below. "Like the Eighth Circuit, I would conclude that Indiana's fetal remains provision is rationally related to the State's interest in protecting public sensibilities. I would add that Indiana has a significant interest in recognizing the dignity and humanity of the unborn child." 888 F.3d at 320.

It is simply impossible to reconcile the rulings of the Seventh and Eighth Circuits based on the language of the statutes and derive a coherent constitutional rule by which to assess fetal disposition laws. Legislators and other public officials need this Court's guidance on the proper legal standard governing fetal disposition laws to

ensure their performance is within their constitutional mandates.

II. Public Officials Need Guidance on Whether Accommodation of the Ancient Common Law Right of Sepulcher Renders a Fetal Disposition Law Unconstitutional.

The Seventh Circuit opinion imposes a substantial, if not insurmountable, barrier to regulating abortion clinics' or health care facilities' disposition of fetal remains, while continuing to respect a woman's right of sepulcher as it exists in many states. The right of sepulcher is a family member's right to "immediate possession of a decedent's body for preservation and burial." 25A C.J.S. Dead Bodies § 13. Indiana law has recognized such a right for 150 years. *Hamilton v. City of New Albany*, 30 Ind. 482 (1868). This right has also been recognized by federal courts.

Just fourteen years ago, this Court noted in a unanimous opinion, "[t]he well-established cultural tradition of acknowledging a family's control over the body and the deceased's death images has long been recognized at common law." *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 158 (2004). This right has such deep historical roots and is of such import that the Ninth Circuit has

characterized a parent's right to choose how to dispose of a child's body as an aspect of substantive due process. *Marsh v. Cty of San Diego*, 680 F 3d 1148, 1154 (9th Cir. 2012).

The opinion below evidences no consideration of this right, instead characterizing the state statute giving a woman "the right to determine the final disposition of the aborted fetus," Ind. Code § 16-34-3-2(a), as a constitutional flaw in Indiana's dispositional provisions. If allowed to stand, the decision requires state legislators to elect between respect for the rights of the family or regulation responding to a persistent problem of improper, if not indecent, disposition of fetal remains by abortion clinics and others.

The persistence of this problem is evidenced by repeated news reports of gruesome discoveries. *E.g.* B.D. Colen, *Hospital Got Cash for Fetuses*, Wash. Post, Feb. 29, 1976, at 25; *500 Fetuses Found by Storage Company in Repossessed Crate*, N.Y. Times, Feb. 8, 1982, at A14; *173 Fetuses Found in Field Doctor Owned*, Wash. Post, Apr. 16, 1992, at A16; *Fetus Parts Found in Abortion Clinic Trash*, N.Y. Times, July 18, 1993, at A30; *Fetuses Found in Calif. Field*, Wash. Post, Mar. 16, 1997, at A13; David Rohde, *A Store Owner Pleads Guilty to Transporting Fetuses Illegally*, N.Y. Times, Mar. 27, 1998, at B8. Joy Blackburn, *Report Finds Luis Hospital's*

Mistakes Range from the Potentially Deadly to Bureaucratic, V.I. Daily News (Sept. 22, 2014),https://advance.lexis.com/api/permalink/4a1d2884-1091-49a5-ab16-28162a897e1b/?context=1000516; Tony Cook, *Company Fined for Accepting Fetal Tissue*, Indianapolis Star, Feb. 17, 2016, at A12; and Donna Halvorsen, *Appeals Court Upholds State Law Requiring 'Dignified' Fetus Burial*, Star Trib., Aug. 3, 1990, at 1A.

Perhaps the most notorious case involving bizarre and gruesome disposition of fetal remains is the case of Philadelphia abortionist, Kermit Gosnell. "The remains of aborted fetuses were stored in water jugs, pet food containers and a freezer at a West Philadelphia abortion clinic, the city's chief medical examiner testified in the murder trial of the doctor who ran the facility." Sarah Hoye, *Medical examiner had to thaw fetal remains in Philly abortion doctor case*, CNN, Apr. 16, 2013, https://www.cnn.com/2013/04/16/us/pennsylvania-abortion-doctor/index.html.

Statutes like those of Indiana and Minnesota are rational attempts to address such abuses, yet lower courts have failed to adopt a consistent method of evaluating fetal disposition laws. For this reason, it is vital that this Court accept certiorari in this case and provide guidance to legislators on the question of whether the constitution requires laws regulating

the conduct of abortion clinics and medical facilities require denial of the common law right of sepulcher.

CONCLUSION

For the reasons set forth above, this Court should grant Indiana's petition for a writ of certiorari.

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PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *ET AL.*, *Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

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INTEREST OF THE *AMICI CURIAE*[1]

Pro-Life Legal Defense Fund, One Nation Under God Foundation, Conservative Legal Defense and Education Fund, Pass the Salt Ministries, Fitzgerald Griffin Foundation, and Policy Analysis Center are nonprofit educational, legal, and religious organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code.

Eleanor McCullen has a pro-life counseling ministry and was the lead plaintiff in McCullen v. Coakley, 134 S.Ct. 2518 (2014).

Liberty Fellowship is a non-IRC section 501(c)(3) church in Kila, Montana, whose pastor is Chuck Baldwin.

Restoring Liberty Action Committee and Center for Morality are educational organizations.

Each of these *amici* seeks, *inter alia*, to participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Indiana's "Sex Selective and Disability Abortion Ban" prohibits abortions solely motivated by the sex, race, or physical or mental disability of the baby. Circuit Court Judge Dan Manion described the members of the protected class as "especially vulnerable unborn children." Planned Parenthood of Ind. & Ky. v. Commissioner, 888 F.3d 300, 310 (7th Cir. 2018) (Manion, J., dissenting). In enacting this law, the Indiana General Assembly sought to reverse policies which had been adopted long ago in Indiana and elsewhere, authorizing the sterilization of women who had certain characteristics, so as to minimize the number of thought-to-be undesirable categories of persons, and thereby improving society. Based on a theory adopted by a relative and follower of Charles Darwin, the desire to give evolution a helping hand , by eliminating the un-fittest, was and is one of the central goals of the eugenics movement.

Standing in the way of the Indiana General Assembly, the Seventh Circuit determined that this Court's decision in Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833 (1992), controlled, allowing the lower courts no latitude to impede a woman's right to terminate her pregnancy — even if the child's life is being ended for reasons that would prevent an employer from firing someone from a job. Neither Roe v. Wade, 410 U.S. 113 (1973), nor Casey addressed the use of abortion to achieve eugenic goals. But, as Judge Manion explained, the lower courts view the right to an abortion as a "super-precedent" which has "spawn[ed] a body of jurisprudence that has made

abortion the only true 'superright' protected by the federal courts today ... the *only* [right] that may not be infringed even for the very best reason. For an unenumerated right judicially created just 45 years ago, that is astounding." Planned Parenthood of Ind. & Ky. at 312 (Manion, J. dissenting).

The Indiana General Assembly enacted its pro-life law to prevent eugenic abortion, which has been made increasingly available by the prevalence of low-cost, non-invasive fetal genetic testing. This case provides this Court with an appropriate vehicle to repudiate its own precedents which embraced eugenics in Buck v. Bell, and to a lesser degree in Skinner v. Oklahoma,. It also presents an opportunity to repudiate certain aspects of eugenics that infect both Roe and Casey. At the same time, other scientific developments have called into question some of the assumptions Justice Blackmun made in Roe regarding the state of medical knowledge as to when life begins. The unfettered right to eugenic abortion, being practiced with increasing frequency today, constitutes an important issue which should be addressed by this Court.

STATEMENT OF THE CASE

The Indiana legislature entitled its law, which is now under review, the "Sex Selective and Disability Abortion Ban." Subsections 4 and 5 of *Indiana Code* Section 16-34-4 prohibit "sex selective abortion." Subsection 6 addresses abortions solely performed because the fetus may have Down syndrome as defined in subsection 2. Subsection 7 addresses abortions solely based on "any other disability" as defined in

subsection 1, including nonlethal physical or mental disabilities, such as scoliosis. Subsection 8 addresses abortion solely based on the race, color, national origin, or ancestry of the fetus. In each case, abortions based solely on these factors are prohibited, whether performed prior to or after viability.

Violation of these prohibitions exposes the abortion doctor to disciplinary sanctions and civil liability for wrongful death. A pregnant woman who seeks a prohibited abortion is not subject to punishment. Although there is no criminal penalty in the new law imposed on the abortionist, prior Indiana law makes it a crime to knowingly and intentionally perform an abortion that is prohibited by law. *Indiana Code* Section 16-34-2-7(a).

The Indiana law was challenged by Planned Parenthood of Indiana and Kentucky, which performs both surgical and non-surgical (or medication) abortions. The U.S. District Court for the Southern District of Indiana first entered a preliminary injunction, and then granted plaintiff's motion for summary judgment, enjoining the State from enforcing the statute. The U.S. Court of Appeals for the Seventh Circuit affirmed. Planned Parenthood of Ind. & Ky. v. Commissioner of the Ind. State Dep't of Health, 888 F.3d 300 (7th Cir. 2018).[2]

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[2] Circuit Judge Manion dissented only as to a different part of the Indiana law requiring that the fetal remains be disposed of in a dignified and humane manner. *See id.* at 317-21.

ARGUMENT

This brief addresses the second issue presented in the petition for certiorari: "Whether a State may prohibit abortions motivated solely by the race, sex, or disability of the fetus and require abortion doctors to inform patients of the prohibition."

I. THE INDIANA LAW UNDER REVIEW SEEKS TO ERADICATE THE STAIN OF EUGENICS ON THE STATE OF INDIANA.

The Indiana statute's prohibited abortion categories were described by dissenting Judge Manion as protecting "especially vulnerable unborn children." Planned Parenthood of Ind. & Ky. at 310 (Manion, J., dissenting). These categories also share a common lineage, as various believers in the "science" of eugenics have sought to at least reduce the number of persons exhibiting certain traits, if not eradicate them entirely.

Eugenics has been described by the man who coined the term as "'the science which deals with all influences that improve the inborn qualities of a race; also with those that develop them to the utmost advantage.'" G.K. Chesterton, Eugenics and Other Evils at 14 (M. Perry, ed.) (Inkling Books, 2000) (quoting Francis Galton, Charles Darwin's half-cousin who has been called the father of eugenics). Although the aim of eugenics has been to improve the "qualities of a race," one of the primary means of doing so has been to reduce the numbers of those who are considered undesirable.

Proponents of eugenics supported immigration policies designed to restrict the numbers of genetically undesirable individuals and to impede reproduction by those considered undesirable.[3] Some states came on board by enacting legislation to sterilize certain people such as the mentally ill. But as Charles Darwin's grandson acknowledged, "'it is quite certain that no existing democratic government would go as far as we Eugenists think right in the direction of limiting the liberty of the subject for the sake of the racial qualities of future generations.'" Chesterton, Eugenics at 13 (quoting Leonard Darwin).

Beginning in the Progressive Era, many states promoted policies designed to improve the gene pool. Indiana was among the leaders in embracing the eugenics movement and its apparent goal to advance the perfectibility of man on earth. On April 27, 1907, Indiana enacted the first eugenics sterilization legislation in the world. One hundred years later, Indiana sought to eradicate this stain on the state in a variety of ways, including the issuance of a formal apology by the Indiana House and Senate. Senate Concurrent Resolution, 115th General Assembly (2007).[4] The Whereas clauses of that resolution recited

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[3] *See* A. Cohen, Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck at 5 (Penguin: 2016).

[4] *See* "A concurrent resolution to mark the centennial of Indiana's 1907 eugenical sterilization law and to express the regret of the Senate and House of Representatives of the 115th Indiana General Assembly for Indiana's experience with eugenics." https://www.in.gov/legislative/bills/2007/SRESP/SC0091.html.

just a few of the unpleasant facts of that era, including this Court's role:

> Whereas, Following the **U.S. Supreme Court precedent**, Indiana enacted a new sterilization law in 1927 authorizing the compulsory sterilization of persons living in a state institution;
>
> Whereas, Indiana **involuntarily sterilized some 2,500 people**, while more than 65,000 people were sterilized under similar laws in 30 other states during the same period;
>
> Whereas, Eugenics legislation **devalued the sanctity of human life**, placed claims of scientific benefit over human dignity, and **denied the inalienable rights** recognized by our Founding Fathers;
>
> Whereas, Eugenics legislation **targeted the most vulnerable** among us, including the poor and racial minorities, wrongly dehumanizing them under the authority of law and for the claimed purpose of public health and the good of the people.... [*Id.* (emphasis added).]

In that resolution's first of two Resolves, the Indiana General Assembly expressed "its regret over Indiana's role in the eugenics movement in this country and the injustices done under eugenic laws." This apology was then followed up with a call to reflection and action:

> the General Assembly urges the citizens of Indiana to become familiar with the history of

> the eugenics movement in the belief that **a more educated and enlightened population will repudiate the many laws passed in the name of eugenics and reject any such laws in the future.** [*Id.* (emphasis added).]

Now, 110 years later, as the Indiana General Assembly's most recent effort to undo the damage of eugenics, it enacted the law under review, this time designed not to eradicate, but to protect, Indiana's vulnerable minorities by prohibiting eugenics-based abortions.[5]

Supporters of abortion rights may find it distasteful to link that judicially sanctioned practice with eugenics, but the tie cannot be ignored, and is being increasingly revealed. Just last year, *The Atlantic* collected comments from readers under the heading "When Does Abortion Become Eugenics?"[6] Among the most startling comments was the fact that China and India "eliminate more girls [every year] than the number of girls born in America every year." It also included this further provocative statement:

> [T]he pro-life camp [has] demonstrated that it is logically impossible to be both "pro-choice"

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[5] *See* Indiana Eugenics, History & Legacy, 1907-2007, http://www.iupui.edu/~eugenics/.

[6] *See* "When Does Abortion Become Eugenics?" *The Atlantic* (2016) https://www.theatlantic.com/notes/all/2016/05/when-does-an-abortion-become-eugenics/483659/.

> and "anti-discrimination." Why is this the case? Because "choice" and "discrimination" are the same thing.

Stated another way, an unlimited right to choose allows that choice be exercised in a manner that is discriminatory. The documentary movie "It's a Girl" exposes the widespread practice of sex-selective abortion — and infanticide — in China and India, euphemistically called "gendercide." In an article about that movie, it is stated that "ultrasound and abortion has increased the ease of gendercide for wealthier people, and so has created unprecedented gender imbalances (140 boys to 100 girls, according to the film)."[7]

It is no coincidence that the plaintiff in this case is a component of the vast network of Planned Parenthood abortion providers, which trace their pedigree and largely owe their existence to their co-founder, Margaret Sanger. Sanger was not shy about her devotion to eugenics:

> As an advocate of Birth Control, I wish to take advantage of the present opportunity to point out that the **unbalance between the birth rate of the "unfit" and the "fit"**, admittedly the greatest present **menace to civilization**,

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[7] N. Berlatsky, "Neither Pro-Life Nor Pro-Choice Can Solve the Selective Abortion Crisis," *The Atlantic* (Mar. 6, 2013). https://www.theatlantic.com/sexes/archive/2013/03/neither-pro-life-nor-pro-choice-can-solve-the-selective-abortion-crisis/273704/.

> can never be rectified by the inauguration of a cradle competition between these two classes. In this matter, the example of the **inferior** classes, the fertility of the feeble-minded, the mentally defective, the **poverty-stricken** classes, should not be held up for emulation to the mentally and physically fit though less fertile parents of the educated and well-to-do classes. On the contrary, **the most urgent problem today is how to limit and discourage the over-fertility of the mentally and physically defective.** [Margaret Sanger, "The Eugenic Value of Birth Control Propaganda,"[8] *Birth Control Review* (Oct. 1921) at 5 (emphasis added).]

In another remarkable paragraph from that 1921 article, Sanger saw birth control as not the only solution to the problem of what she viewed as irresponsible breeding, but anticipated that governments someday may need to resort to force to defend against this perceived threat to mankind. One can only imagine what she had in mind in penning these words:

> Birth Control is not advanced as a panacea by which past and present **evils of dysgenic breeding** can be magically eliminated.

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[8] *See* https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?_sangerDoc=238946.xml.

> Possibly **drastic and Spartan methods**[9] **may be forced** upon society if it continues complacently to encourage the **chance and chaotic breeding** that has resulted from our **stupidly cruel sentimentalism**. [*Id.* (emphasis added).]

The Seventh Circuit's decision viewed the constitutionality of abortion eugenics in simple terms. The Court read Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), to have established a "categorical" and "unambiguous" right of every woman to terminate her pregnancy before viability. Planned Parenthood of Ind. & Ky. at 305. Although Casey did not address the issue of genetic abortion, the Seventh Circuit read it as establishing a right not only to terminate a pregnancy (and a baby), but also to do so for any reason whatsoever.[10]

Likewise, in dissent, Judge Manion agreed that the genetic abortion ban constituted a "substantial obstacle" to seeking abortion, and thus was not

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[9] Certainly, "drastic and Spartan methods" were later used in Germany. *See* T. Murphy & M. Lappe, Justice and the Human Genome Project (U. Cal Press: 1994) ("The most powerful union of eugenic research and public policy occurred in Nazi Germany. Much of eugenic research in Germany before and even during the Nazi period was similar to that in the United States and Britain....")

[10] For the same reason, the Seventh Circuit struck down the statutory requirement that women be advised of the non-discrimination limits on abortion prior to the procedure. Planned Parenthood of Ind. & Ky. at 307.

permissible under Casey. Planned Parenthood of Ind. & Ky. at 310 (Manion, J., dissenting). But he contended there remained "two major flaws" in the Casey analysis.

> First, *Casey* treats abortion as a super-right, more sacrosanct even than the enumerated rights in the Bill of Rights.[11] And second, while *Casey* jettisoned *Roe*'s strict-scrutiny test for all first-trimester abortion regulation, it replaced strict scrutiny with an effects-based test that is actually *more difficult to* satisfy in many cases. [*Id.* at 311.]

Combined, these two "flaws" were enough to defeat Indiana's compelling interest to prevent the targeting of "protected classes" by "private eugenics" when weighed against the constitutionally unknown, judicially manufactured "super-right" to abortion.

II. THIS CASE GIVES THIS COURT AN OPPORTUNITY TO REJECT ITS DEEPLY FLAWED DEFENSE OF POLICIES GROUNDED IN EUGENICS.

The Petition for Certiorari refers to the Indiana statute as an anti-eugenics law, but did not explain why that description is judicially significant. The Indiana General Assembly's apology for its record of eugenics contained a reference to Buck v. Bell, 274

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[11] Justice Thomas made this same point in his dissent from the denial of a petition for certiorari in Silvester v. Becerra, 583 U.S. ___ (2018).

U.S. 200 (1927). In a remarkably short opinion, Justice Oliver Wendell Holmes, Jr. put this Court on record on the side of the "science"[12] of eugenics. Laying aside the issue of the likely fabrication of the facts of the case,[13] the Supreme Court affirmed the constitutionality of the forced sterilization of a supposedly feeble-minded woman. Justice Holmes elevated "the State" over the individual, expressing his disdain for the "lower classes":

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon **those who already sap the strength of the State** for these lesser sacrifices, often not felt to be such by those concerned, in order to **prevent our being swamped with incompetence**. [Buck at 207 (emphasis added).]

Then, calling upon his considerable skill to turn a phrase, he added yet another ringing justification for sterilization:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their

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[12] The Court then, as well as the Court now, has been warned about deferring to bogus science: "O Timothy, keep that which is committed to thy trust, avoiding profane and vain babblings, and oppositions of science falsely so called...." 1 Timothy 6:20 (KJV).

[13] *See* A. Cohen, Imbeciles, at 24-25, 296.

> imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson* v. *Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough. [*Id.*]

Here is revealed that one goal of eugenics is to justify the prevention of a birth: to prevent crime, avoid starvation, and improve the society and the world.

The weak may be sacrificed for the common good. Yet all of these reasons that undergird eugenics policies have now been rejected broadly by Americans.[14] While it is true that, in Skinner v. Oklahoma, 316 U.S. 535 (1942), this Court imposed an equal protection limitation on the power of states to classify crimes for which sterilization is allowed, that decision allowed the practice of forced sterilization to continue.[15] Neither Skinner nor Buck has ever been overruled, but both deserve to be tossed into the "dustbin of history." Granting certiorari in this case

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[14] The state legislatures of Indiana, Virginia, Oregon, North Carolina, and California have publicly repudiated their involvement in the eugenics movement. *See* Indiana General Assembly Concurrent Resolution, *supra*.

[15] "Precisely because *Buck* was not overruled in *Skinner*, sterilization continued in asylums and welfare offices in America long after the case was decided...." V. Nourse, In Reckless Hands: *Skinner v. Oklahoma* and the Near Triumph of American Eugenics at 158 (W.W. Norton 2008).

would give this Court the opportunity to take that important step.[16]

Although not often regarded in the same category as Buck v. Bell and Skinner v. Oklahoma, this Court's abortion jurisprudence shares certain characteristics with those cases.

Forced sterilization is certainly distinguishable from unrestricted abortion. Forced sterilizations are carried out by the state against individuals targeted by the state. Abortions are carried out by abortionists who may or may not be paid by the state, and it is the mother, not the state, who decides which babies live and which die.[17] However, there is little question that abortion was adopted by eugenicists to provide a backup method to improve the gene pool, if birth control did not prevent the pregnancy. The introductory paragraphs of Justice Blackmun's opinion

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[16] To keep faith with the American people, it is important that Courts admit mistakes when recognized. Buck v. Bell has stood for 91 years, but is indefensible and should be overruled. To paraphrase Justice Holmes, "Nine decades of eugenics is enough." It took this court 74 years to correct the record on Korematsu v. United States, 323 U.S. 214 (1944), which was finally repudiated earlier this year, but for reasons unknown does not appear to have been technically "overruled." Trump v. Hawaii, 585 U.S. ___, 138 S.Ct. 2392, 2423 (2018).

[17] This difference was set out: "If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or **eugenics**, for example." Casey at 859 (emphasis added).

in Roe v. Wade, 410 U.S. 113 (1973) invoked the eugenic specter of "population growth, pollution, poverty, and racial overtones" which he said "tend to complicate and not to simplify the problem." Roe at 116. Equally disturbing was Justice Blackmun's review of the history of abortion, tracing it back to pagan cultures, as though those societies were worthy of emulation. *Id.* at 129.

Additionally, Justice Blackmun repeatedly cited Margaret Sanger biographer Lawrence Lader's 1966 book Abortion to support his arguments. Lader's later work "Breeding Ourselves to Death," (1971) addresses many of the assumptions of the eugenics movement. And he repeatedly cited Glanville Williams, a Fellow of the British Eugenics society, and his book The Sanctity of Life and the Criminal Law. One of the sentences from the book on which Justice Blackmun relied, but did not quote, constituted a ringing endorsement of eugenics:

> There is, in addition, the problem of eugenic quality. We now have a large body of evidence that, since industrialization, the **upper stratum of society** fails to replace itself, while the population as a whole is increased by excess births among the **lower and uneducated classes**. [Glanville Williams, The Sanctity of Life and the Criminal Law, (emphasis added) quoted in P. Mosley, "Why

the Hysteria Over *Roe*? Because it Would Strike a Blow to Eugenics (July 6, 2018).[18]]

III. IN THE 45 YEARS SINCE ROE, SCIENCE HAS ADVANCED TO ESTABLISH THE PERSONHOOD OF AN EMBRYO.

Justice Blackmun in Roe v. Wade made several observations as to the state of medical knowledge as it existed in 1973. *See, e.g.,* Roe v. Wade at 116 ("advancing medical knowledge and techniques"); 149 ("Modern medical techniques"); 159 ("at this point in the development of man's knowledge"). Such observations give rise to the inference that, as medical knowledge advances, the Court's decision would need to be re-examined — and would be re-examined as needed. This is such a case. This *amicus* brief reports on just three recent scientific developments.

First, in the last decade, a scientific development has come to the fore which challenges Justice Blackmun's theories about viability, physical development, and stages of pregnancy — known as Contact Embryoscopy. This scientific breakthrough allows physicians to visualize a fetus through the cervix beginning at the gestational age of 8 to 12 weeks — within the first trimester.[19] This new technology even has led to the development of free apps which

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[18] *See* http://www.frcblog.com/2018/07/why-hysteria-over-emroeem-because-it- would-strike-blow-eugenics/.

[19] *See* https://www.researchgate.net/publication/22418753_Contact_embryoscopy.

allow parents to track the growth of their baby in utero on their cell phones or tablets — seeing pictures and videos which reflects each stage of their baby's development — beating hearts, developing eyes, emerging fingers, changing facial expressions, and much more.[20] Contact Embryoscopy has eviscerated the oft-repeated "blob of tissue" justification for abortion.

Second, in 2011, a remarkably detailed and scientifically based study by two professors was published, entitled Embryo: A Defense of Human Life. This book did not focus on religious or moral issues, but rather cataloged available scientific data detailing every stage of the development, from the moment of formation of a single zygote cell onward — whether termed an embryo, or later a fetus. Based on that extensive analysis, this book drew three conclusions — that an embryo is: (i) distinct from parents; (ii) genetically human; and (iii) complete — ergo, a human being.

> First, the embryo is from the start **distinct** from any cell of the mother or the father.... Second, the embryo is **human**; she has the genetic makeup characteristic of human beings. Third, and most important, the embryo is a **complete** or whole organism, though immature. The human embryo, from conception onward, is fully programmed and

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[20] *See* The Endowment for Human Development's "See Baby Pregnancy Guide," which is described as "Changing the way people see pregnancy." And indeed, it has.

> has the active disposition to use that information to develop herself to the mature stage of a human being.... None of the changes that occur to the embryo after fertilization, for as long as she survives, generates a new direction of growth.... A human embryo is not something different in kind from a human being. [Robert P. George and Christopher Tollefsen, Embryo: A Defense of Human Life, (Witherspoon Institute, 2nd ed. 2011) at 49-50 (emphasis added).]

These two professors concluded that, just as post-natal human beings progress through stages of life, the "embryonic, fetal, child, and adolescent stages are *just that* — stages in the development of a determinate and enduring entity — a human being — who comes into existence in a single-celled organism (a zygote) and develops, if all goes well, into adulthood many years later." *Id.* at 50.

Third, at the same time that science is revealing that an embryo is just another stage in the continuum of human development, genetics is placing a "decision point" in the hands of parents where no decision point ever previously existed. The Seventh Circuit explained that Indiana's "non-discrimination provisions were prompted by the medical advances of non-invasive genetic testing which allow for the detection of disabilities at an early stage in the pregnancy." Planned Parenthood of Ind. & Ky. at 303. The ease and speed with which science can identify genetic conditions of unborn children is improving at

an astonishing pace.[21] And it is this wealth of available genetic information about a baby which provides the impetus for some parents to consider abortion as an option, where otherwise it would never have been considered. Stated another way, where previously there would have been no thought even given to making a pregnancy-ending decision, parents are now asked to make a decision — which is very different from the decision addressed in Roe and Casey.

Today, abortions can be had not because the mother does not want to have a child — but because the mother does not want *that kind* of child. As Judge Easterbrook put it:

> there is a difference between "I don't want a child" and "I want a child, but only a male" or "I want only children whose genes predict success in life." Using **abortion to promote eugenic goals** is morally and prudentially debatable on grounds **different from** those that underlay **the statutes *Casey* considered**. [Planned Parenthood of Ind. & Ky. v. Comm'r of the Ind. State Dep't of Health, 2018 U.S. App. LEXIS 17676 at *11-*12 (2018) (Easterbrook, J., dissenting from

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[21] Such non-invasive prenatal DNA testing is widely advertised, sometimes costing under $1,000. One common test examines fetal cells found in a maternal blood sample drawn anytime after the 10th week of gestation, and swabs from the father. *See, e.g.*, http://www.prenatalgeneticscenter.com/services/prenatal-dna-paternity-test/.

denial of rehearing *en banc*) (emphasis added).]

Indeed, these scientific developments raise questions not previously considered, or decided, by this Court. Whether there should exist what Judge Easterbrook called "a parallel 'except' clause" for eugenics-motivated abortion occurring with increasing frequency constitutes an "important question of federal law that has not been, but should be, settled by this Court...." Supreme Court Rule 10(c).

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be granted and the second issue presented should be decided by this Court.

Respectfully submitted,

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No. 18-483

In The Supreme Court of the United States

KRISTINA BOX, COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE RESTORATION PROJECT; PASTOR JOSEPH PARKER, PASTOR OF GREATER TURNER CHAPEL A.M.E. CHURCH; EVERLASTING LIGHT MINISTRIES; PROTECT LIFE AND MARRIAGE TEXAS; AND THE THOMAS MORE SOCIETY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The Restoration Project ("TRP") is a non-profit organization dedicated to rebuilding families, promoting the sanctity of life, and providing related educational materials, in order to transform American public policy and culture's impact on Black life. TRP works with pastors, ministry leaders and organizations to restore a culture of uprightness, evenhandedness, and virtue.

Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church in Greenwood, MS, has served as a pastor of different congregations for a little more than 40 years. He has been working to stand up for life against abortion for more than 20 years and is disturbed by the abortion industry's deliberate targeting of the African American community.

Everlasting Light Ministries is a comprehensive post-abortion healing and marriage ministry that seeks to heal the massive devastation of abortion and marital discord in America and especially in communities of color; proclaim the truth about abortion and its real life consequences; and sensitize communities to the needs of all post-abortive, post-miscarriage people.

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[1] Counsel for Petitioners and Respondents received timely notice of amici curiae's intent to file this brief and counsel for Petitioners and Respondents have consented to its filing. Further, as required by Supreme Court Rule 37.6, counsel certifies this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than amici curiae, their members, or their counsel.

Protect Life and Marriage Texas works to uphold the Judeo-Christian ethic established by our Founding Fathers in our society with the view of securing liberty for marriages, the American family and the life of the unborn.

The **Thomas More Society** ("TMS") is a national public interest law firm devoted to restoring respect in the law for life, the family and religious liberty. Based in Chicago, TMS accomplishes its organizational mission through litigation, education, and related activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici The Restoration Project, Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church, Everlasting Light Ministries, Protect Life and Marriage Texas, and the Thomas More Society submit this brief to aid the Court in assessing the gravity of the problem Indiana's HEA 1337 and similar state statutes seek to address. Invidious discrimination in the provision of abortion services is an entrenched and escalating phenomenon. Babies of minority mothers are aborted at a far higher rate than their white counterparts—a disturbing trend that the abortion industry intentionally and unabashedly perpetuates. With recent advances in prenatal testing technology, abortions motivated by the unborn child's gender, disability, and

other disfavored genetic traits are also dramatically on the rise.

HEA 1337 and similar state laws are sensible and important legislative responses to racist, sexist, and eugenic practices performed under the guise of "reproductive rights." This Court should grant certiorari in order to reverse the Seventh Circuit and reinstate HEA 1337.

ARGUMENT

I. The Delivery of Abortion Services is Infected with Racial Bias.

A. The origins of abortion are racist and eugenic.

The eugenic origins of the birth-control movement—the progenitor of the abortion rights movement—are well-established. *See, e.g.*, Rebecca A. Messall, *Margaret Sanger and the Eugenics Movement*, HUMAN LIFE REV., Spring 2010, at 98 (noting that the founders and early leaders of what became Planned Parenthood were all members of the American Eugenics Society). Margaret Sanger, the founder of the birth control organization that became Planned Parenthood, wrote:

> [T]he example of the inferior classes, the fertility of the feeble-minded, the mentally defective, the poverty-stricken classes, should not be held up for emulation to the mentally and physically fit though less fertile parents of the educated and well-to-do classes. On the

> contrary, **the most urgent problem today is how to limit and discourage the over-fertility of the mentally and physically defective**.

Margaret Sanger, *The Eugenic Value of Birth Control Propaganda*, BIRTH CONTROL REV., Oct. 1921, at 5, available at https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=238946.xml.

Scholars of the history of the eugenics movement acknowledge that Sanger "supported some eugenic aims, and was not above voicing her contempt for the poor, disabled and minorities." Paul A. Lombardo, *Symposium Article: Disability, Eugenics, and the Culture Wars*, 2 ST. LOUIS U. J. HEALTH L. & POL'Y 57, 76 (2008). They also acknowledge that in Planned Parenthood's early advocacy for birth control, "[t]he organization focused on unwanted children and pathological parenting in poor African American communities. . . ." Mary Ziegler, 25 YALE J.L. & FEMINISM 1, 13 (2013); *see also Birth Control or Race Control? Sanger and the Negro Project*, Newsletter #28 (The Margaret Sanger Papers Project, New York University, New York, N.Y.), Fall 2001 (conceding that "the patriarchal racism of the time . . . dictated both the Federation's and Sanger's approach to blacks and birth control"), https://www.nyu.edu/projects/sanger/articles/bc_or_race_control.php. To early advocates of birth control and abortion, minority racial groups were among "the mentally and physically defective" whose fertility they sought to limit.

B. The modern abortion industry continues to target ethnic minorities.

Modern advocates of abortion disavow the racism of Planned Parenthood's founders. *See, e.g.*, Now This News, Group Nine Media, Inc., Video: *The History of 100 Years of Women's Health Care at Planned Parenthood*, Jan. 17, 2017, https://www.youtube.com/watch?v=VqYspn7PZmQ (acknowledging that "there's no question that Margaret left behind a conflicting legacy" but asserting that "*[r]acism and ableism do not have a place at Planned Parenthood and sure as [expletive] don't represent the organization's commitment to equality*").

Demographic data tell a different story. Minority babies in America are at far greater risk from abortion than white babies. In parts of this country, black babies are more likely to be aborted than they are to be born alive. *See, e.g.*, N.Y. STATE DEP'T OF HEALTH, TABLE 23: INDUCED ABORTION AND ABORTION RATIOS BY RACE/ETHNICITY AND RESIDENT COUNTY NEW YORK STATE—2013, VITAL STATISTICS OF N.Y. STATE 2013, *available at* https://www.health.ny.gov/statistics/vital_statistics/2013/table23.htm (noting that in New York City in 2013, 1180 black babies were aborted for every 1000 live births, compared to 240 white babies). In 2014, the rate of abortion among black women was 3.5 times the abortion rate among white women. *See* Tara C. Jatlaoui et al., *Ctrs. for Disease Control & Prevention, Abortion Surveillance—2014, Morbidity and Mortality Weekly Report*, Vol. 66, No. 24 (Nov. 24, 2017), at 1-48, *available at* https://www.cdc.gov/mmwr/volumes/66/ss/ss6624a1.

htm ("CDC"). In Indiana in 2017, 9.7% of the state population was black but black women had 30.6% of the state's abortions. *See* INDIANA STATE DEP'T OF HEALTH, TERMINATED PREGNANCY REPORT 2017 10, *available at* https://www.in.gov/isdh/files/2017%20Indiana%20Terminated%20Pregnancy%20Report.pdf; UNITED STATES CENSUS BUREAU, QUICK FACTS: INDIANA, https://www.census.gov/quickfacts/in (last visited Nov. 8, 2018). The numbers are similarly grim for Hispanic babies. *See, e.g.*, N.Y. STATE DEP'T OF HEALTH, *supra* (610 Hispanic babies were aborted per 1000 live births in New York City in 2013, compared to 240 white babies).

Abortion advocates contend that preexisting cultural and socioeconomic factors have caused these racial disparities. *See, e.g.*, Preterm, *A Commitment to Racial Justice* (2018), www.preterm.org/racial-justice ("Because of racial injustice, women of color are both more likely to need abortions, and less likely to be able to afford them. For us, reproductive justice includes racial justice."). By the industry's account, its provision of abortion in significantly higher rates to minority women than to white women is a beneficent response to the minority population's greater "need," rather than a function of anything that the abortion industry has done to inflate demand in the minority population. But these claims are belied by the industry's business and marketing practices.

A study based on 2010 Census data reveals that Planned Parenthood has located 79% of its surgical abortion centers within walking distance of

minority-dense neighborhoods. *See* Susan W. Enouen, Life Issues Institute, *New Research Shows Planned Parenthood Targets Minority Neighborhoods*, LIFE ISSUES CONNECTOR (Oct. 2012), http://www.protectingblacklife.org/pdf/PP-Targets-10-2012.pdf; *see also* Mark Crutcher et al., Life Dynamics Inc., *Racial Targeting and Population Control* 22, 2011, https://issues4life.org/pdfs/racial_targeting_population_control.pdf (reporting based on census-based study of family planning clinics that "there is not one state in the union without population control centers located in zip codes with higher percentages of blacks and/or Hispanics than the state's overall percentage").[2]

Planned Parenthood claims that locating their clinics near minority communities is part of their outreach to those most in "need" of their services. *See, e.g.*, Hilary Cadigan, *Planned Parenthood moves to EAV*, CREATIVE LOAFING, June 16, 2017, https://creativeloafing.com/content-266693-Planned-Parenthood-moves-to-EAV ("Rollins School of Public Health graduate students from Emory University conducted a relocation analysis to identify strategic locations for the Atlanta

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[2] Planned Parenthood tried to counter this analysis of the Census data with a Guttmacher Institute study allegedly finding that only a small percentage of Planned Parenthood clinics are located in "majority-black neighborhoods," but Guttmacher's study was carefully manipulated to produce a misleading result. *See* Willis L. Krumholz, *Yes, Planned Parenthood Targets and Hurts Poor Black Women*, THE FEDERALIST, Feb. 18, 2016, http://thefederalist.com/2016/02/18/yes-planned-parenthood-targets-and-hurts-poor-black-women/ (explaining the defects in the Guttmacher data and its misinterpretation by defenders of Planned Parenthood).

health center. The East Atlanta site is located in an area of need for our sexual and reproductive health services. . . ."). But community health centers, which provide medical services to low-income patients, are not similarly concentrated in minority neighborhoods; they perceive needs for their services in other communities as well. *See* Charlotte Lozier Institute, *Maps: Health Clinics Nationwide Compared to Planned Parenthood Centers*, Aug. 21, 2015, https://lozierinstitute.org/health-clinics-nationwide-compared-to-planned-parenthood-centers/. Only a provider that receives the lion's share of its revenues as payment for abortions has made the deliberate strategic choice to locate its surgical abortion clinics near high-density minority communities. Willis L. Krumholz, *Planned Parenthood's Big Bad Business Model*, THE FEDERALIST, Oct. 27, 2015, http://thefederalist.com/2015/10/27/planned-parenthoods-big-bad-business-model/ ("revenue from abortion provides the highest profit margins, and is the biggest contributor to [Planned Parenthood] affiliates' total profit").

Since Planned Parenthood began to concentrate its abortion services intentionally in minority communities, the number of minority abortions has dramatically increased while the abortion rate among white women has declined. *See* Susan W. Enouen, Life Issues Institute, *More Evidence Planned Parenthood Markets Abortion to Minorities*, June 14, 2016, https://www.lifeissues.org/2016/06/pp-markets-abortion-minorities/ ("[F]rom 1990 to 2008, before and after Planned Parenthood's reinvention, the percentage of abortions

received by Black women increased by 9.0%; for Hispanic women it rose 7.6% while the percentage of abortions received by white women declined by 11.1%."). Not coincidentally, during the same interval, Planned Parenthood's revenues have skyrocketed. *See* Willis L. Krumholz, *Guttmacher Erases Data To Protect Planned Parenthood, IUDs*, THE FEDERALIST, Apr. 12, 2016, http://thefederalist.com/2016/04/12/guttmacher-erases-data-to-protect-planned-parenthood-iuds/ (exposing the Guttmacher Institute's manipulation of data to mask the fact that Planned Parenthood had increased its profits by altering its business model in such a way as to bring about a dramatic increase in minority abortion rates).

In addition to deliberately situating their abortion clinics close to minority communities, Planned Parenthood also makes a concerted marketing effort to encourage such communities to avail themselves of its abortion services. For example, Planned Parenthood's "Black Community" Twitter feed makes public statements encouraging black women to support and patronize Planned Parenthood, such as: "If you're a Black woman in America, it's statistically safer to have an abortion than to carry a pregnancy to term or give birth." @PPBlackComm, Twitter, Oct. 31, 2017, 8:13 AM, https://twitter.com/ppblackcomm/status/925380307242582016?lang=en.

Given its strategic location of abortion clinics near minority neighborhoods and its blatant marketing of abortion to the minority community, the abortion industry's claims to bear no responsibility for the

staggering numbers of minority abortions beggars belief. *See* Crutcher et al., *supra* (noting that "these patterns are routinely considered indicative of racial targeting when it comes to other issues," such as when civil rights advocates criticize tobacco and alcohol companies for concentrating their retail and marketing efforts disproportionately in minority neighborhoods).

C. Socioeconomic factors alone do not explain the different treatment of racial minorities.

Abortion is not the only instance of the medical community treating minority patients differently from their white counterparts. In a 2002 study, the Institute of Medicine ("IOM") found that "[e]vidence of racial and ethnic disparities in healthcare is, with few exceptions, remarkably consistent across a range of illnesses and healthcare services." INST. OF MED., UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 5 (2002), *available at* https://www.nap.edu/read/10260/chapter/1#ii ("IOM"); *see also* Tara Culp-Ressler, *Challenging Medical Racism and Physicians' Preference for White Patients*, THINK PROGRESS, Feb. 23, 2015, https://thinkprogress.org/challenging-medical-racism-and-physicians-preference-for-white-patients-59bec589df88/.

Such disparities are not attributable to socioeconomic differences, the IOM observed: "The majority of studies . . . find that racial and ethnic disparities remain even after adjustment for socioeconomic

differences and other healthcare access-related factors." *Id.*; *see also* Erin Peterson et al., *Why childbirth is a death sentence for many black moms*, Oct. 13, 2018, https://www.11alive.com/article/news/investigations/mothers-matter/why-childbirth-is-a-death-sentence-for-many-black-moms/85-604079621 ("Black women die at higher rates regardless of their education, how much money they make or preexisting conditions."). Rather, research suggests "that healthcare providers' diagnostic and treatment decisions, as well as their feelings about patients, are influenced by patients' race or ethnicity." IOM, *supra*, at 11. Among other studies, the IOM cited one that "found that doctors rated black patients as less intelligent, less educated, more likely to abuse drugs and alcohol, more likely to fail to comply with medical advice, more likely to lack social support, and less likely to participate in cardiac rehabilitation than white patients, even after patients' income, education, and personality characteristics were taken into account." IOM, *supra*, at 11.

Planned Parenthood itself has decried the racial disparities in the delivery of healthcare services and has acknowledged that such disparities cannot be explained solely by socioeconomic factors:

> [E]ven after accounting for socioeconomic factors, educated, middle-class Black women were found to be at even higher risk of having smaller, premature babies with a lower chance of survival. A growing body of research is linking racism-related stress and chronic worry about racial discrimination with Black-White

> disparities. The U.S. has a legacy of reproductive oppression which may cause some women to delay getting care. And unconscious bias may also play an important role.

Birth Outcome Disparities Among Black Women, PLANNED PARENTHOOD OF THE PACIFIC SOUTHWEST, INC., BLOG (Mar. 2, 2018, 11:04 PM), https://www.plannedparenthood.org/planned-parenthood-pacific-southwest/blog/birth-outcome-disparities-among-black-women.

In Planned Parenthoods's narrative, abortion is always described as part of the *solution* to these disparities—not part of the problem. *See id.* (recommending "reproductive life planning and pre-conception care services offered at [Planned Parenthood]" as part of the path "to better birth outcomes for Black women"); *see also* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POLICY REVIEW 3, Aug. 6, 2008, *available at* https://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture. Abortion advocates never acknowledge that the correlation of the concentration of abortion clinics near minority communities with *increasing* unintended pregnancy and abortion *in those same communities* suggests at least that "reproductive life planning" services are not *improving* outcomes for minority women.

In fact, the correlation between increased access to abortion services and poorer health outcomes suggests that the abortion industry is harming those women. Despite the barriers to collecting data about abortion, scientists are increasingly able to document

connections between abortion and the negative health outcomes that afflict minority communities. *See, e.g.*, Brent Rooney et al., *Does Induced Abortion Account for Racial Disparity in Preterm Births, and Violate the Nuremberg Code?*, J. AM. PHYS. & SURGEONS, Winter 2008, at 102, *available at* http://www.jpands.org/vol13no4/rooney.pdf (documenting a link between preterm birth and prior induced abortion). Occasionally, extreme instances of such outcomes even appear in the media. *See, e.g.*, Rosemary Parker, *Dead woman's ultrasound showed clot, problems after abortion, records show*, MICHIGANLIVE, Apr. 13, 2017, https://www.mlive.com/news/kalamazoo/index.ssf/2017/04/dead_womans_ultrasound_showed.html (documenting the death of a young black woman after an abortion at Planned Parenthood); Matthew Hay Brown, *Abortion opponents want tighter regulations*, THE BALTIMORE SUN, Mar. 2, 2011, https://www.baltimoresun.com/bs-mtblog-2011-03-abortion_opponents_want_tighte-story.html (reporting tragic outcomes after abortion, including the death of a young black woman).

Perhaps it is unsurprising that abortion advocates deny that racial bias could infect the abortion industry, but there is no objective reason to doubt that racial bias exists at least as much in that industry as it does everywhere else. Just like other medical treatments, the available data confirm that the racial disparities in the incidence of abortion are not reducible to socioeconomic disparities. There are roughly twice as many poor white women in the United States as there are poor black women, and yet poor black women account

for more of the nation's abortions (14.1%) than poor white women do (11.7%). *See* Rachel K. Jones & Megan L. Kavanaugh, *Changes in Abortion Rates Between 2000 and 2008 and Lifetime Incidence of Abortion*, 117 OBST. & GYN. 1358-66 (June 2001). Thus, poverty can't be the whole story. Disparities in access cannot be a sufficient explanation either, since Planned Parenthood has made its services even more available to minority populations than to disadvantaged members of other groups, and its efforts have not slowed the increasing rate of minority abortions.

It is widely acknowledged that—consciously or unconsciously—the medical community treats minority patients differently than it treats similarly-situated white patients. There is no reason to believe that there is any *less* racism at work in the abortion context. Moreover, considering the abortion industry's history as an explicitly racist social movement, its unapologetic targeting of minority communities even to this day, and the increasingly poor health outcomes of the communities it claims to serve, there is every reason to believe that racism plays a profound role in the delivery of abortion services. *See* TooManyAborted.com, *The Negro Project*, http://www.toomanyaborted.com/thenegroproject/ (last visited Nov. 13, 2018) (noting the continuing effects of Margaret Sanger's "Negro Project" on today's black communities); Tanya L. Green, *The Negro Project: Margaret Sanger's EUGENIC Plan for Black America*, BLACKGENOCIDE.ORG, http://www.blackgenocide.org/archived_articles/negro.html (last visited Nov. 13,

2018) (describing the Negro Project and its unfortunate ongoing legacy).

II. Sex-Selection Abortions are a Reality in the United States.

Abortions for the purpose of eliminating a baby of an undesired sex occur frequently in the United States. Because women seeking abortions are not routinely required to declare their motivation, there are no statistics showing precisely how often sex selection is a motive, or the only motive, in seeking an abortion. *See* Sujatha Jesudason & Susannah Baruch, *Sex Selection: What Role for Providers*, 86 CONTRACEPTION 6, 597 (2012), *available at* https://www.contraceptionjournal.org/article/S0010-7824(12)00796-2/pdf (acknowledging lack of "official data on the frequency of pre- or during-pregnancy sex selection," but provider experience and media coverage indicating it is a common practice). But data from the few groups with a known single-gender preference, widespread acceptance of other types of sex-selective reproductive technology, and mainstream defense of the right to sex-selective abortion all demonstrate that sex-selective abortion is a reality in the United States.

A. Available statistics reflect widespread use of sex-selective abortion.

Sex-selective abortion is not typically detectible in birth rate statistics because it can be used to eliminate either sex, but where a cultural group has a

single-gender preference, the results of sex-selection abortion can be seen in altered sex ratios at birth (SRBs). Studies of data from the "Asian-Pacific" population, which is characterized by "son-preference," from the 2000 census revealed "[n]aturally impossible SRBs within particular ethnic groups. . . ." Nicholas Eberstadt, *The Global War Against Baby Girls*, THE NEW ATLANTIS, Fall 2011, *available at* https://www.thenewatlantis.com/publications/the-global-war-against-baby-girls. In other words, the sex-ratios at birth of the children of Americans of Asian-Pacific origin were skewed so far from what is naturally possible that the use of sex-selection to avoid the birth of daughters is undeniable. Moreover, the sex-ratios at birth became more sharply distorted among babies later in birth-order, which "strongly suggest[s] that sex-selective abortions were the driver." *Id.*; Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data*, 1 AM. ECON. J.: APPLIED ECON. 2, 1, 3, 7, 15, 25-26 (2009), *available at* https://pdfs.semanticscholar.org/8f71/b2fb8f1184351113414f5d4201e02fb70e95.pdf (concluding that Chinese and Indian parents were more likely to have a son at their third and fourth births than the other ethnic groups that were studied); Kelsey Harkness, *Sex Selection Abortions are Rife in the U.S.*, NEWSWEEK, Apr. 14, 2016, *available at* https://www.newsweek.com/sex-selection-abortion-rife-us-447403; *see also* Sunita Puri et al., *"There Is Such a Thing as Too Many Daughters, but Not Too Many Sons": A Qualitative Study of Son Preference and Fetal Sex Selection Among Indian Immigrants in the United States*, 72 SOC. SCI. & MED. 1169 (2011) (study of 65 Indian

immigrant women "found that 40% of the women interviewed had terminated prior pregnancies with female fetuses and that 89% of women carrying female fetuses in their current pregnancy pursued an abortion").

Although statistics can only reflect the practice when there is a single gender preference, there is no reason to believe that only women in cultures with a "son-preference" have availed themselves of sex-selective abortion in the United States. Medical providers in the United States often cater to the preferences of prospective parents to achieve a certain "family balance" in terms of number and gender of children. Jesudason & Baruch, *supra*, at 597 (elaborating on "family balancing" as a motive for sex selection). This "family balancing" motivation for sex-selective abortions exists wherever pre-natal diagnosis and abortion are both available, and its prevalence is evident in the lucrative "reproductive technology" industry.

B. Americans freely make use of reproductive technologies for the purpose of selecting a child of a particular sex.

Although abortions for the purpose of sex-selection are not susceptible to data tracking, it is well established that Americans embrace several other reproductive technologies for the purpose of choosing a future baby's sex, including one that, like abortion, ends the lives of one's own already-conceived genetic offspring. A lucrative industry has developed around

offering prospective parents the ability to select their baby's gender via pre-implantation genetic diagnosis ("PGD"). Jasmeet Sidhu, *How to Buy a Daughter: Choosing the sex of your baby has become a multi-million-dollar industry*, SLATE.COM, Sept. 14, 2012, *available at* http://www.slate.com/articles/health_and_science/medical_examiner/2012/09/sex_selection_in_babies_through_pgd_americans_are_paying_to_have_daughters_rather_than_sons_.html ("Gender selection now rakes in revenues of at least $100 million every year.").

PGD refers to the testing of embryos generated by in vitro fertilization for particular traits. *Id.* Once the embryos are sorted by trait, parents may choose which to implant in a women's uterus in order to bear a baby with the desired characteristic. PGD is used throughout the world for diagnostic purposes, but the United States is one of the only countries in which PGD is legal for non-medical reasons such as sex-selection. *Id.* ("It is illegal for use for nonmedical reasons in Canada, the U.K., and Australia."); Michelle J. Bayefsky, *Comparative preimplantation genetic diagnosis policy in Europe and the USA and its implications for reproductive tourism*, 3 REPROD. BIOMEDICINE & SOC. ONLINE 41 (2016) ("The USA stands apart in its laissez-faire approach towards the use of PGD."). Accordingly, the United States has become a destination for "medical tourism" in this area.

A 2004 study found that 40% of Americans had no concern about PGD as a means of selecting the gender of future children. GENETICS & PUBLIC POLICY CENTER,

REPRODUCTIVE GENETIC TESTING: WHAT AMERICA THINKS 11 (2004), *available at* https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/976/ReproGenTestAmericaThinks.pdf?sequence=1&isAllowed=y. "A 2006 survey by Johns Hopkins University found that 42 percent of fertility clinics offered PGD for gender selection. . . . [And] that was . . . before many clinics undertook aggressive online marketing campaigns to drive the demand." Sidhu, *supra*; *see also* Bayefsky, *supra* ("Elective sex selection is reported to account for 9% of PGD uses in the USA."). PGD is popular with women because unwanted embryos are destroyed prior to implantation in the uterus, which avoids the need for a physically and emotionally taxing abortion. However, PGD is by no means easy: it involves medical procedures to harvest eggs and implant embryos; it is extremely costly; and it does not always yield viable embryos. *See, e.g.*, Sidhu, *supra*.

A less invasive and less costly method of trying to pre-select a baby's sex is "sperm sorting," which involves centrifugally sorting a sperm sample by weight into groups of sperm that are more or less likely to include a Y chromosome, then using a preferred group of sperm for IVF or artificial insemination. World Health Org. Genomic Resource Ctr., *Gender and Genetics: Genetic Technologies for Sex-Selection, Prefertilization*, http://www.who.int/genomics/gender/en/index4.html (last visited Nov. 13, 2018). This method of gender selection is far less invasive than PGD and far less expensive, but it is also far less reliable, with success rates of only 75 to 85%. *Id.*

Sperm sorting is widely available in the United States, but at $1500 per attempt, it is still out of reach to most prospective parents, and, in up to 25% of cases, it yields an unwanted child of the opposite sex. *See id.*; *see also, e.g.*, Sidhu, *supra* (detailing the history of a mother who tried sperm sorting to achieve a female child, conceived a male she considered aborting, then went into debt for two rounds of IVF and PGD).

The demand within the United States for procedures such as PGD and sperm-sorting evidences a societal embrace of using reproductive technology for sex-selection. A culture in which the wealthy are engaging in PGD and sperm-sorting undoubtedly includes many who are pursuing the same result through the less costly means of sex-selective abortion.

C. Unlike most of the world, American abortion activists defend the choice to abort a fetus because of a preference for the other sex.

Fearing any narrowing of a woman's right to choose abortion, abortion proponents in the United States and the United Kingdom openly call for protecting the right to abort because of a preference for one sex or another: "If the U.S. Supreme Court thinks sex selection is sexist, more states will begin to chip away at a woman's reasons for terminating her pregnancy." Sital Kalantry, *Challenging the Narrative on Sex-Selective Abortion Bans*, MS. MAGAZINE BLOG (Aug. 25, 2017). They recognize the inconsistency between

viewing abortion as an absolute right and prohibiting certain reasons for choosing abortion: "Banning sex-selective abortion opens up a world in which there is such thing as a "good" and "bad" reason for an abortion." Pam Lowe, *Why I oppose a ban on sex-selection abortion*, THE CONVERSATION, Jan. 26, 2015, http://theconversation.com/why-i-oppose-a-ban-on-sex-selection-abortion-36684. "What could stop a state from banning abortions for reasons the majority regards as "trivial," such as wanting to complete one's education or be successful in a career?" Bonnie Steinbock, *Preventing Sex-Selective Abortions in America: A Solution in Search of a Problem*, THE HASTINGS CENTER, Apr. 4, 2017, https://www.thehastingscenter.org/preventing-sex-selective-abortions-america-solution-search-problem/.

Thus, faced with legislation prohibiting sex discrimination by means of sex-selective abortion, even civil rights activists condemn such legislation as a "burden on women obtaining abortions that they want for whatever reason." Kelly P. Kissell, *Arkansas considers banning 'sex-selection' abortions*, APNEWS.COM, Feb. 9, 2017, https://apnews.com/c4c4d2f92b634a8f8e9d311b4c385fa9 (quoting Rita Sklar, executive director of Arkansas ACLU). "Once again, the call for government intervention to prevent sex selective abortion conflicts with the preservation of reproductive rights." DANIEL GOODKIND, SEX-SELECTIVE ABORTION, REPRODUCTIVE RIGHTS AND THE GREATER LOCUS OF GENDER DISCRIMINATION IN FAMILY FORMATION: CAIRO'S UNRESOLVED QUESTIONS 16 (1997), *available at* https://www.psc.isr.umich.edu/pubs/pdf/rr97-383.pdf. "[E]ven the most

terrible reason for having an abortion holds more sway than the best imaginable reason for compelling a woman to carry to term." Sarah Ditum, *Why Women Have a Right to Sex-Selective Abortion*, THE GUARDIAN, Sep. 19, 2013, https://www.theguardian.com/commentisfree/2013/sep/19/sex-selective-abortion-womans-right.

Given public support for using reproductive technology to choose the gender of born children, as well as cultural defense of sex-selective abortion, and data from son-preferring ethnic groups, it is impossible to deny that abortions for the purpose of sex-selection are routinely being performed in the United States.

III. Abortion for the Purpose of Eliminating a Disabled Person is Commonplace in the United States.

A 2012 study of Down syndrome terminations in the United States demonstrates that prospective parents choose to terminate approximately 67% of fetuses diagnosed prenatally with Down syndrome. J.L. Natoli et al., *Prenatal diagnosis of Down syndrome: a systematic review of termination rates (1995-2011)*, 32 PRENATAL DIAGNOSIS 142 (2012), *available at* https://www.ncbi.nlm.nih.gov/pubmed/22418958. The number of births of people with Down syndrome in the United States is therefore 30% below natural rates. Gert de Graaf et al., *Estimates of the live births, natural losses, and elective terminations with Down syndrome in the United States*, 167A AM. J. MED. GENETICS 756 (2015).

These numbers do not rival the decimation in Down syndrome populations in places like Iceland, where only one or two babies are born with Down syndrome per year, or Denmark, where only four prenatally diagnosed Down syndrome babies were born in 2016. Jerome Lejeune Foundation, *All Danish babies with Down syndrome aborted but 4 in 2016*, Dec. 22, 2017, https://lejeunefoundation.org/denmark-down-syndrome-abortion/. However, the United States' termination rate is sufficient to raise concern, particularly given that Down syndrome is the most common and among the least debilitating of the disorders that can be diagnosed prenatally. Lindsay Abrams, *Prenatal Testing: Earlier and More Accurate Than Ever*, THE ATLANTIC, Nov. 5, 2012, *available at* http://www.theatlantic.com/health/archive/2012/11/prenatal-testing-earlier-and-more-accurate-than-ever/264472/2/. People with Down syndrome can live lives of ordinary length and function well enough to live independently and be employed. National Down Syndrome Society, *Down Syndrome Facts*, https://www.ndss.org/about-down-syndrome/down-syndrome-facts/ (last visited Nov. 13, 2018). Though less thoroughly documented, fetuses diagnosed with more debilitating disorders are undoubtedly aborted at higher rates even than 67%. *See, e.g.*, I.C. Lakovschek et al., *Natural outcome of trisomy 13, trisomy 18, and triploidy after prenatal diagnosis*, 155A AM. J. MED. GENETICS 2626 (2011) (studying a population of prenatally diagnosed fetuses with triploidy, trisomy 13, and trisomy 18, and finding that 78% of cases were terminated, so only 22% remained for a study of "natural outcomes").

Government has myriad legitimate interests in preventing the termination of disabled fetuses. Disability rights activists argue that aborting a fetus on the basis of disability is the vilest form of disability discrimination, victimizing the disabled "at their most vulnerable stage." Grazie Pozo Christie, *Eugenics and Equality Can't Mix: Aborting babies with detected disabilities is incompatible with equality*, U.S. NEWS & WORLD REPORT, Aug. 26, 2016, *available at* https://www.usnews.com/opinion/articles/2016-08-26/eugenic-abortion-is-a-challenge-to-equality-for-people-with-disabilities. In addition to moral concerns, a high rate of terminations raises practical concerns for the future diversity of the United States, because the practice of eliminating disabled people may become self-perpetuating: more terminations of disabled fetuses "could in turn result in increased social pressure to terminate, particularly if the diagnosed conditions were to become rarer in society resulting in a decline of support services (e.g. respite care homes for Down's [sic] Syndrome families). In practice, it could become increasingly difficult for a patient who has received a positive test result not to 'choose' to abort." CAROLINE WRIGHT, PHG FOUNDATION, CELL-FREE FETAL NUCLEIC ACIDS FOR NON-INVASIVE PRENATAL DIAGNOSIS: REPORT OF THE UK EXPERT WORKING GROUP 17 (2009), *available at* http://www.phgfoundation.org/documents/214_1260287360.pdf. Moreover, eliminating most people with disabilities raises grave concerns for the lives of those who do live with disabilities. In addition to dwindling support for their unique challenges, increasing rarity and the sense of

disability being "avoidable" is likely to increase the stigma associated with disability. *Id.* at 29.

IV. Eugenic Abortions are Likely to Become More Common in the U.S. As Non-Invasive Prenatal Diagnostic Tools are Increasingly Available and Increasingly Sophisticated.

Compounding the timeless objections to determining which humans will be born based on traits like sex and disability is the strong likelihood that the practice of trait-selective abortion is going to grow exponentially in frequency because of the widespread use of non-invasive prenatal diagnostic ("NIPD") technology. *See* Erin Biba, *This Simple Blood Test Reveals Birth Defects—And the Future of Pregnancy*, WIRED MAGAZINE, Dec. 24, 2012, https://www.wired.com/2012/12/ff-prenatal-testing/; Henry T. Greely, *Get Ready for the Flood of Fetal Gene Screening*, 469 NATURE 289, 289 (2011). In the past several years, new NIPD tests have become available, both through providers and over-the-counter, that indicate very early in pregnancy the various genetic features of babies, including sex and disability status. *See, e.g.*, Abrams, *supra*; Carolyn Y. Johnson, *DNA Blood Test Can Detect Prenatal Problems*, BOSTON GLOBE, Feb. 26, 2014, *available at* http://www.bostonglobe.com/lifestyle/health-wellness/2014/02/26/new-study-suggests-prenatal-genetic-tests-could-offered-all-pregnant-women/V1GQuRL4jkr1M6Oe1XcQCK/story.html.

The new tests, which evaluate fetal DNA present in the mother's blood, have three major advantages over past methods of prenatal testing: (1) they are non-invasive of the uterus because they require only a maternal blood test, (2) they are increasingly inexpensive as the technology becomes more widespread, and (3) they are accurate very early in pregnancy. Jaime S. King, *And Genetic Testing for All . . . The Coming Revolution in Non-Invasive Prenatal Genetic Testing*, 42 Rutgers L. J. 599, 616 (2011). As a result of all of these features, medical and social commentators agree that the incidence of trait-selective abortion is likely to greatly increase in the coming years. *See, e.g.*, Wright, *supra*, at 19 ("The major ethical concern in this area is therefore that prenatal fetal sex determination, in combination with termination of pregnancy, could result in sex selection for non-medical or 'trivial' reasons, which could have major implications for society."); Michael Stokes Paulsen, *It's a Girl*, PUBLIC DISCOURSE, Oct. 24, 2011, https://www.thepublicdiscourse.com/2011/10/4149/ ("Watch for a spike in abortion rates over the next few years as parents find it easier and cheaper to 'choose' to have a boy by killing the fetus if . . . it's a girl.").

V. Anti-Discrimination Laws Like HEA 1337 are a Reasonable Legislative Response to Odious Social Practices.

The Court should grant certiorari in order to vindicate states' rights to pass sensible legislation designed to address the troubling phenomenon of

discrimination based on race, gender, and disability in the abortion context. The State of Indiana undeniably has a legitimate interest in trying to end discrimination against racial minorities, the female sex, and disabled persons. There is ample evidence, from this country and others, to support the enactment of legislative prohibitions as one strategy for combating such invidious discrimination.

For example, although racial discrimination in medicine is a complicated issue that defies simple solution, the Institute of Medicine recommended enforcement of anti-discrimination laws as one strategy for addressing it. *See* IOM, *supra*, at 187-88. There is no reason to think that enforcing a prohibition on racial discrimination in the abortion industry would contribute any less to ameliorating the gross racial disparities in that setting.

Meanwhile, as noted above, many countries prohibit sex discrimination in the context of other reproductive technologies. *See supra* Section II.B. Some countries also prohibit sex-selective abortion,[3] while

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[3] *See, e.g.*, Chinadaily.com, *China bans selective abortion to fix imbalance*, July 16, 2004, http://www.chinadaily.com.cn/english/doc/2004-07/16/content_349051.htm; Arindam Nandi & Anil Deolalikar, *Does a legal ban on sex-selective abortions improve child sex ratios? Evidence from a policy change in India*, 103 J. OF DEVEL. ECON. 216 (2013) (arguing that India's ban on sex-selective abortions has had a positive impact on that country's gender imbalance), *available at* https://econpapers.repec.org/article/eeedeveco/v_3a103_3ay_3a2013_3ai_3ac_3ap_3a216-228.htm.

others are considering banning it.[4] And as Petitioners have pointed out, many other States have already enacted laws banning abortions on the basis of race, gender, or disability. *See* Pet. for Cert. at 25.[5]

Banning abortions on the basis of race, gender, and disability is a prudent—even laudable—step for a legislature seeking to deter increasingly widespread eugenic practices that devalue and disadvantage the most vulnerable members of society. This Court should not permit the Seventh Circuit decision invalidating such a ban to stand.

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[4] *See, e.g.*, Adam Forrest, *Early Gender tests 'leading to selective abortions of girls in UK'*, INDEPENDENT, Sept.17, 2018, https://www.independent.co.uk/news/health/selective-abortions-gender-tests-girls-uk-labour-a8540851.html (discussing a movement in the UK to ban sex-selective abortion).

[5] Eight state laws outlawing sex-selective abortion: Ariz. Rev. Stat. Ann. § 13-3603.02; Ark. Code Ann. § 20-16-1904 (eff. Jan. 1, 2018); Kan. Stat. Ann. § 65-6726; N.C. Gen. Stat. § 90-21.121; N.D. Cent. Code § 14-02.1-04.1; Okla. Stat. tit. 63, § 1-731.2; 18 Pa. Cons. Stat. § 3204; S.D. Codified Laws § 34-23A-64. One state law banning abortions on the basis of race: Ariz. Rev. Stat. Ann. § 13-3603.02. Three state laws banning abortions on the basis of genetic abnormality: La. Rev. Stat. Ann. § 40:1061.1.2; N.D. Cent. Code § 14-02.1-04.1; Ohio Rev. Code Ann. § 2919.10.

CONCLUSION

The Supreme Court should grant certiorari in this case in order to reverse the Seventh Circuit and affirm that States may prohibit abortion based on a baby's race, gender, or disability.

Respectfully submitted,

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No. 18-483

In the Supreme Court of the United States

KRISTINA BOX, COMMISSIONER,
INDIANA DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA
AND KENTUCKY, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICUS CURIAE* SUSAN B. ANTHONY LIST IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Court's abortion precedents protect the eugenic practice of Down syndrome discrimination abortion.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Susan B. Anthony List ("SBA" or "SBA List") is a "pro-life advocacy organization," *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2339 (2014) (internal quotation marks omitted), dedicated to reducing and ultimately eliminating abortion by electing national leaders and advocating for laws that save lives, with a special calling to promote pro-life women leaders.

SBA List combines politics with policy, investing heavily in voter education to ensure that pro-life Americans know where their lawmakers stand on protecting the unborn, and in issue advocacy, advancing pro-life laws through direct lobbying and grassroots campaigns.

SBA List supports policies designed to reduce and eliminate the eugenic practice of Down syndrome discrimination abortion. Research has shown that individuals with Down syndrome are among the happiest people in the world and bring tremendous joy to their families. In some Western nations, however, children diagnosed with Down syndrome are on the verge of being eliminated from society through selective abortion.

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[1] No counsel for a party authored this brief in whole or part. No one other than *Amicus Curiae* Susan B. Anthony List or its counsel made a monetary contribution to the preparation or submission of this brief. On or before November 5, 2018, counsel of record for all parties received notice that *Amicus Curiae* Susan B. Anthony List intended to file this brief. All parties have consented to the filing of this brief.

SBA List is deeply involved in the process of persuading fellow citizens of the rightness of its cause and effecting change through political processes. SBA List strongly supports the proposition that this Court should allow citizens of this country to determine abortion policies through democratic processes.

SUMMARY OF THE ARGUMENT

1. If the Court denies review of the Down syndrome protections at issue in this case, lower courts and future litigants would benefit from an accompanying statement clarifying that such policies present a question of first impression under this Court's abortion precedents.

To date, 12 federal judges in two circuits have split eight to four on whether this Court's abortion precedents protect the eugenic practice of Down syndrome discrimination abortion.

Eight judges have adopted or endorsed the view that the rule of viability set out in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), categorically excludes any previability abortion restriction.

On the other side of the split, Circuit Judge Frank H. Easterbrook, Circuit Judge Diane S. Sykes, Circuit Judge Amy Coney Barrett, and Circuit Judge Michael B. Brennan have endorsed the view that whether government may prohibit the eugenic practice of Down syndrome discrimination abortion presents a question of first impression under the abortion precedents of this Court. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, No.

17-3163, 2018 U.S. App. LEXIS 17676, at *10 (7th Cir. Jun. 25, 2018) (Easterbrook, J., dissenting).

Amicus strongly supports a grant of review in this case. At the same time, *Amicus* respectfully submits that, if the Court denies review of the Down syndrome protections at issue in this case, lower courts and future litigants would nevertheless greatly benefit from an accompanying statement clarifying that whether the U.S. Constitution bars such protections presents a question of first impression under the abortion precedents of this Court.

2. If the Court grants review, it may uphold Indiana's Down syndrome protections without disturbing the Court's abortion precedents.

As Circuit Judges Easterbrook, Sykes, Barrett, and Brennan persuasively argue, this Court's abortion precedents do not address much less settle the question whether government may prohibit the eugenic practice of Down syndrome discrimination abortion. Accordingly, the Court could uphold such a law without disturbing those underlying precedents.

Arguments developed by University of Georgia Law Professor Randy Beck provide another path to upholding Down syndrome protections without overturning the general rule of viability. Under this approach, the Court would recognize that different durational rules apply to different government interests in regulating abortion. The Court would then clarify that the viability rule does not attach to regulations advancing the government interest in prohibiting Down syndrome discrimination.

3. The Court should grant the petition and abandon the viability rule.

The Supreme Court has overruled its prior decisions in more than 230 cases. Clarke D. Forsythe, *Article: A Draft Opinion Overruling* Roe v. Wade, 16 Geo. J.L. & Pub. Pol'y 445, 448 (2018). It should do so again in this case by granting the petition and abandoning the viability rule.

In a 2012 article published in the Notre Dame Law Review, University of Georgia Law Professor Randy Beck explains that the Court has made exceptions to the general rule of stare decisis in three types of situations.

(1) When an earlier Court "purported to resolve issues not raised by the case before it."

(2) When an earlier Court "acted based on inadequate briefing or cursory deliberation."

(3) When an earlier Court "failed to adequately explain the reasoning underlying a legal conclusion."

Randy Beck, *Transtemporal Separation of Powers in the Law of Precedent*, 87 Notre Dame L. Rev. 1405, 1429 (2012) [hereinafter Beck, *Law of Precedent*].

When a previous ruling suffers from one or more of these three defects, Professor Beck explains, the Court is freed from strict adherence to stare decisis and may take corrective action, such as when the Court "narrowly construes prior decisions," "accords diminished precedential weight," or "denies stare decisis effect altogether." *Id.*

Professor Beck argues that each of these three exceptions to stare decisis applies to the viability rule established in *Roe* and affirmed in *Casey*.

Freed from the constraint of strict adherence to unworthy precedent, the Court enjoys an array of excellent reasons to abandon the viability rule on its merits. To provide just one example here, the point at which a child attains viability—and thus becomes eligible for legal protection in jurisdictions that provide it—can vary based on factors including race, whether the mother smokes, access to treatment facilities, and even altitude.

ARGUMENT

I. If the Court denies review of the Down syndrome protections at issue in this case, lower courts and future litigants would benefit from an accompanying statement clarifying that such policies present a question of first impression under this Court's abortion precedents.

To date, 12 federal judges in two circuits have split eight to four on the question whether *Roe* and *Casey* protect the eugenic practice of Down syndrome discrimination abortion. *Amicus* strongly supports a grant of review in this case. If the Court denies review of the Down syndrome protections at issue in this case, lower courts and future litigants nevertheless would greatly benefit from an accompanying statement clarifying that such policies present a question of first impression under this Court's abortion precedents.

A. To date, 12 federal judges in two circuits have split eight to four on whether this Court's abortion precedents protect the eugenic practice of Down syndrome discrimination abortion.

The question whether government may prohibit the eugenic practice of Down syndrome discrimination abortion has not yet produced a formal split between courts. *See* Amanda Stirone, *Overview of Legislation and Litigation Involving Protections Against Down Syndrome Discrimination Abortion*, Charlotte Lozier Inst., Nov. 14, 2018 (summarizing litigation to date), https://lozierinstitute.org/overview-legislation-litigation-involving-protections-against-down-syndrome-discrimination-abortion/. However, even at this early stage, a divergence has begun to emerge in the opinions held by individual federal judges. To date, 12 federal judges in two circuits have split eight to four on the question whether this Court's abortion precedents protect the eugenic practice of Down syndrome discrimination abortion. A 13th judge in a third circuit sidestepped the issue on grounds of standing.

This split in federal judicial opinion, some of it expressed in rulings of the court and some of it expressed in a concurring or dissenting opinion, puts the "categorical approach" in contest with the "question-of-first-impression approach."

The categorical approach holds that the viability rule set out in *Roe* and *Casey* categorically excludes any previability abortion restriction including prohibitions on the eugenic practice of Down syndrome discrimination abortion.

The categorical view has been adopted by the district court judge in *Pre-Term Cleveland v. Lance Himes*, 294 F. Supp. 3d 746, 752 (S.D. Oh. 2018), the district court judge in the present case, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859, 866-67 (S.D. Ind. 2017), and the three-judge circuit court panel in the present case, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 306 (7th Cir. 2018). The categorical approach has also been endorsed by three circuit judges concurring in the decision of the Seventh Circuit to deny en banc review in the present case. *See PPINK*, 2018 U.S. App. LEXIS 17676, at *3 (Wood, C. J., concurring in denial of en banc review).

On the other side of the split is the view that Down syndrome protections present a constitutional question of first impression under the abortion precedents of this Court. This is the question-of-first-impression approach.

To date, the question-of-first-impression approach has been endorsed by Circuit Judge Frank H. Easterbrook of the U.S. Court of Appeals for the Seventh Circuit, in his opinion dissenting from the Seventh Circuit's denial of en banc review in the present case, *PPINK*, 2018 U.S. App. LEXIS 17676, at *10 (Easterbrook, J., dissenting), as well as by Circuit Judge Diane S. Sykes, Circuit Judge Amy Coney Barrett, and Circuit Judge Michael B. Brennan, each of whom joined Judge Easterbrook's dissenting opinion, *id.*

A 13th judge in a third circuit sidestepped the issue on grounds of standing. *See June Med. Servs. LLC v. Rebekah Gee*, 280 F. Supp. 3d 849, 861 (M.D. La. Nov. 16, 2017).

B. The Court need not answer the underlying constitutional issue to clarify that Down syndrome protections present a question of first impression under this Court's abortion precedents.

Amicus strongly supports a grant of review in this case. At the same time, *Amicus* respectfully submits that, if the Court denies review of the Down syndrome protections at issue in this case, lower courts and future litigants would nevertheless greatly benefit from an accompanying statement clarifying that whether the U.S. Constitution bars such protections presents a question of first impression under the abortion precedents of this Court.

Such a statement need not say whether a law prohibiting the eugenic practice of Down syndrome abortion withstands constitutional scrutiny. Significant utility would be gained from even a more limited statement simply clarifying that this Court's abortion precedents do not answer this newly presented question regardless to what extent the principles articulated by those precedents may bear on the resolution of such a case. Accordingly, the question is one that lower courts remain free to answer in the light of the Constitution and relevant precedents, until this Court should choose to provide its own answer.

II. If the Court grants review, it may uphold Indiana's Down syndrome protections without disturbing the Court's abortion precedents.

The Court enjoys at least two options for upholding prenatal Down syndrome protections without disturbing the viability rule set out in *Roe* and *Casey*. As Circuit Judges Easterbrook, Sykes, Barrett, and Brennan argue, the question is one of first impression under this Court's abortion precedents. Arguments developed by University of Georgia Law Professor Randy Beck provide a second path.

A. As Circuit Judges Frank H. Easterbrook, Diane S. Sykes, Amy Coney Barrett, and Michael B. Brennan argue, restrictions on eugenic abortion present a question of first impression under Supreme Court abortion precedents.

In the split of opinion between federal judges on the question of whether this Court's abortion precedents protect eugenic abortion, *see supra*, Section I.A., Circuit Judges Frank H. Easterbrook, Diane S. Sykes, Amy Coney Barrett, and Michael B. Brennan have the better position. This Court's abortion precedents simply do not address whether states may restrict the practice of eugenic abortion. Whether a Down syndrome antidiscrimination law violates the general right to abortion located by this Court in the U.S. Constitution presents a question of first impression for this Court.

In the words of Circuit Judge Easterbrook's opinion dissenting from denial of en banc review in the instant case, "Judicial opinions are not statutes; they resolve

only the situations presented for decision." *PPINK*, 2018 U.S. App. LEXIS 17676, at *11 (Easterbrook, J., dissenting). And in *Casey*, Judge Easterbrook explains, the Supreme Court "did not consider the validity of an anti-eugenics law." *Id.*

Judge Easterbrook cites to the compelling "parallel" of public policy exceptions to the general rule of at-will employment. *Id.* "Judges often said that employers could fire workers for any or no reason. That's the doctrine of employment at will. But by the late twentieth century," Judge Easterbrook explains, "courts regularly created exceptions when the discharge was based on race, sex, or disability. *Casey* does not tell us whether a parallel 'except' clause is permissible for abortions." *Id.*

Judge Easterbrook continues this powerful line of argumentation. "*Casey* and other decisions hold that, until a fetus is viable, a woman is entitled to decide whether to bear a child. But there is a difference," Judge Easterbrook observes, "between 'I don't want a child' and 'I want a child, but only a male' or 'I want only children whose genes predict success in life.' Using abortion to promote eugenic goals," Judge Easterbrook writes, "is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered." *Id.* at *12.

The bottom line in this argument is that, in Judge Easterbrook's words, "None of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." *Id.* Accordingly, the Court could uphold a Down syndrome antidiscrimination law

without disturbing its precedents establishing a general right to abortion.

B. Arguments developed by University of Georgia Law Professor Randy Beck offer a second path for upholding Down syndrome protections without disturbing the rule of viability set out in *Roe* and *Casey*.

Randy Beck is Associate Dean for Academic Affairs and Justice Thomas O. Marshall Chair of Constitutional Law at the University of Georgia School of Law. He has authored several scholarly articles discussing the general abortion rule of viability.

Professor Beck certainly offers many criticisms of the viability rule itself. However, he also offers a simple but elegant argument for how the Court could uphold a pain-capable 20-week abortion law without discarding the viability rule.

Here, *Amicus* sets out Professor Beck's unique argument for pain-capable 20-week laws and then applies that argument to Down syndrome protections.[2]

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[2] With permission of the author, a counsel on this brief, this section of the brief draws from arguments developed by Thomas M. Messner including in *Ohio Vigorously Defends Down Syndrome Antidiscrimination Law*, Charlotte Lozier Inst., Mar. 21, 2018 (applying Beck's 20-week arguments to Down syndrome protections).

i. *Roe* stands for the proposition that different durational rules may attach to different government interests.

The first part of Professor Beck's innovative argument comes directly from the 1973 *Roe v. Wade* decision itself.

Beck observes that *Roe* "took the position that the point at which a particular state interest would justify substantial restrictions on abortion depended on the particular state interest in question." Randy Beck, *State Interests and the Duration of Abortion Rights*, 44 McGeorge L. Rev. 31, 55 (2013) [hereinafter Beck, *State Interests*].

Under *Roe*, Beck explains, "an interest in promoting maternal health justified regulation at the end of the first trimester," *id.* whereas the "interest in protecting fetal life justified regulation only at viability," *id.*

In other words, in *Roe* the Court imposed two different durational rules, one for one state interest and one for a different state interest. Accordingly, *Roe* stands for the proposition that different durational rules attach to different government interests.

ii. *Gonzales v. Carhart* stands for the proposition that government may lawfully assert different interests than those at stake in *Roe* and *Casey*.

The second part of Beck's argument comes from this Court's ruling in *Gonzales v. Carhart*, 550 U.S. 124

(2007), which upheld the federal Partial-Birth Abortion Ban Act of 2003.

In *Gonzales*, Beck writes, "the Court saw the statute as furthering a multiplicity of state interests distinct from the interest in protecting the life of any particular fetus." Beck, *State Interests*, *supra* at 55. "The statute was thought to preserve respect for human life among the public and the medical profession, protect the ethics and reputation of medical personnel, and clarify the distinction between abortion and infanticide." *Id.*

Accordingly, *Gonzales* stands for the proposition that government may lawfully assert different interests in regulating abortion than the interests at stake in *Roe* and *Casey*.

iii. Together, *Roe* and *Gonzales* stand for the proposition that the durational rule of viability need not attach to every government interest in regulating abortion.

Professor Beck combines the legal principles derived from *Roe* and *Gonzales* into a single, powerful argument.

Professor Beck acknowledges that "the *Gonzales* opinion 'assumed' that the viability rule would remain the measure of the duration of abortion rights." Beck, *State Interests*, *supra* at 55. He argues, however, that, "[j]ust as the states could assert the distinct interests recognized in *Roe* at different points in pregnancy, now that *Gonzales* permits states to advance previously unrecognized interests in support of abortion regulations, there is no reason all of those interests should be subject to the same durational line." *Id.*

Professor Beck specifically applies this argument to pain-capable 20-week abortion limits. "Consider, for example," he writes, "the state laws passed in a number of jurisdictions forbidding most abortions after twenty weeks of pregnancy on the theory that the fetus can feel pain at that stage of development." *Id.*

Professor Beck argues that "[t]he Court could appropriately confine the viability rule to the state interest the Court designed the rule to cover, a purely moral assessment of the value of unborn human life, and recognize different durational limits for the new state interests now permitted under *Gonzales*," *id.* at 56, such as the state interest in protecting pain-capable children.

Professor Beck's argument would allow the Court to uphold a pain-capable 20-week abortion limit without overturning the general rule of viability.

iv. The government interest in prohibiting eugenic abortion is different from the government interest at stake in *Roe* and *Casey* and should not be subject to the same durational rule.

So far as *Amicus* is aware, Professor Beck has not addressed the issue of Down syndrome discrimination abortion directly. That said, *Amicus* contends that Professor Beck's innovative argument for pain-capable 20-week laws leads to the same result when applied to Down syndrome antidiscrimination protections.

Just as Professor Beck argues with respect to pain-capable 20-week laws, in considering a Down

Syndrome abortion ban "[t]he Court could appropriately confine the viability rule to the state interest the Court designed the rule to cover, a purely moral assessment of the value of unborn human life, and recognize different durational limits for the new state interests now permitted under *Gonzales*," *id.*, such as the state interest in protecting unborn children from unjust discrimination.

Under this approach, the Court could uphold a prohibition on the eugenic practice of Down syndrome discrimination abortion without disturbing the general rule of viability set out in *Roe* and *Casey*.

III. The Court should grant the petition and abandon the viability rule.

The Supreme Court has overruled its prior decisions in more than 230 cases. Clarke D. Forsythe, *Article: A Draft Opinion Overruling* Roe v. Wade, 16 Geo. J.L. & Pub. Pol'y 445, 448 (2018). It should do so again by granting review in this case and abandoning the viability rule.

A. Professor Beck has identified three situations where this Court limits the weight normally accorded to precedent under the general rule of stare decisis. Each exception applies with full force to reconsideration of the viability rule.

In his 2012 Notre Dame Law Review article *Transtemporal Separation of Powers in the Law of Precedent*, Professor Beck discusses three situations

where the Court has recognized limitations to the general rule of stare decisis.[3]

(1) When an earlier Court "purported to resolve issues not raised by the case before it."

(2) When an earlier Court "acted based on inadequate briefing or cursory deliberation."

(3) When an earlier Court "failed to adequately explain the reasoning underlying a legal conclusion."

Beck, *Law of Precedent*, *supra* at 1429.

When a previous ruling suffers from one or more of these three defects, Professor Beck explains, the Court is freed from strict adherence to stare decisis and may take corrective action, such as when the Court "narrowly construes prior decisions," "accords diminished precedential weight," or "denies stare decisis effect altogether." *Id.*

Professor Beck argues that each of these three exceptions to stare decisis applies to the viability rule established in *Roe* and affirmed in *Casey*. In Professor Beck's words, "the Court should not view the viability rule as binding precedent precluding future examination of the duration of abortion rights on the basis of plenary briefing and argument." *Id.* at 1464.

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[3] With permission of the author, a counsel on this brief, this section of the brief draws heavily from Thomas M. Messner, *Former Kennedy Law Clerk Argues Stare Decisis No Obstacle to Reversing Roe and Casey's "Viability Rule,"* Charlotte Lozier Inst., Nov. 9, 2018.

i. The first exception to stare decisis – Dictum versus holding – Professor Beck argues that "the issue of the duration of abortion rights was not before the Court" in *Roe* or *Casey*.

The first exception to stare decisis identified by Professor Beck centers on situations where an earlier court "purported to resolve issues not raised by the case before it." *Id.* at 1429. Professor Beck argues that the viability rule suffers from this defect.

In Professor Beck's view, the *Roe* Court's "articulation of the viability rule constituted dictum, unnecessary to resolve the case before the Court." *Id.* at 1460. Professor Beck writes that "[t]he *Roe* litigation involved a challenge to a Texas statute that prohibited *all* abortions except those necessary to save the mother's life." *Id.* (emphasis added). Professor Beck explains that the *Roe* Court "concluded that a woman has a fundamental right to terminate an unwanted pregnancy and that the states lack a compelling interest in protecting fetal life *at the outset of pregnancy*." *Id.* (emphasis added). Once the Court reached this conclusion, Professor Beck contends, "the invalidity of the [Texas] statute was established *regardless of how far into pregnancy the right to an abortion extends.*" *Id.* (emphasis added). In other words, "[t]he validity of the Texas statute did not turn on the question of *when in pregnancy* a state may regulate to protect fetal life." *Id.* (emphasis added).

Professor Beck views the Court's "internal deliberations in *Roe*" as confirmation "that the viability rule represented an attempt to resolve an issue not

presented by the pending litigation." *Id.* at 1461. Professor Beck explains that "[t]he files of Justice Blackmun and other retired Justices show that the viability rule did not make its way into the *Roe* opinion until the third draft circulated to the Court." *Id.*

"Justice Blackmun's acknowledgement that *Roe's* second draft included dictum, Justice Stewart's identification of the first-trimester cutoff as part of that opinion's dicta, and the fact that the third draft's shift to a viability cutoff did not alter the Court's analysis," Professor Beck argues, "all show the majority's awareness that adoption of the viability rule was unnecessary to review of the Texas statute." *Id.*

Professor Beck argues that *Casey* suffers from the same flaw and does "not cure the defects in the *Roe* Court's defense of the [viability] rule." *Id.* at 1463. "[A]s in *Roe*," Beck writes, "the Pennsylvania regulations at issue in *Casey* applied from the outset of pregnancy. As a consequence, the reaffirmation of the viability rule in *Casey* also represented dictum, unnecessary to resolution of the issues before the Court." *Id.*

ii. The second exception to stare decisis – Inadequate briefing and argumentation.

The second exception to stare decisis identified by Professor Beck centers on situations where an earlier court "acted based on inadequate briefing or cursory deliberation." *Id.* at 1429. Professor Beck argues that the viability rule suffers from this defect too.

According to Professor Beck, the parties in *Roe* "did not address the question of, assuming a right to

abortion, how far into pregnancy it extends." *Id.* at 1462. He writes that "[t]hose challenging the Texas statute denied that the state possessed a compelling interest in fetal life that would support the legislation as written *but did not speculate about whether a more narrowly drawn statute might further such an interest*" *Id.* (emphasis added). At the same time, according to Professor Beck, "[t]he defenders of the statute claimed a compelling state interest in protecting fetal life *from the outset of pregnancy.*" *Id.* (emphasis added). Moreover, Beck asserts, at oral argument the advocates "avoided answering such line-drawing questions." *Id.*

The bottom line here is that, according to Professor Beck, the *Roe* Court "adopted the viability rule without the benefit of adversarial briefing or argument on the duration of abortion rights." *Id.*

Professor Beck further argues that *Casey* did not cure this defect. According to Professor Beck, "the parties in *Casey* did not brief the Court on potential arguments for or objections to the viability rule." *Id.* at 1463.

iii. The third exception to stare decisis – Inadequate legal justification.

The third exception to stare decisis identified in Professor Beck's research centers on situations where the Court has "failed to adequately explain the reasoning underlying a legal conclusion." *Id.* at 1429. Professor Beck argues that the viability rule also suffers from this defect.

Professor Beck writes that "scholars have long recognized that the Court utterly failed to justify the

viability rule." *Id.* at 1462. Professor Beck quotes Professor John Hart Ely explaining that *Roe's* discussion of viability "seem[ed] to mistake a definition for a syllogism," Professor Laurence Tribe writing that the *Roe* opinion "offers no reason at all for what the Court has held," and Professor Christopher Eisgruber describing the *Roe* Court's defense of the viability rule as "blatantly circular." *Id.* at 1462–63 (internal quotation marks omitted).

Clarke D. Forsythe and Stephen B. Presser provide additional examples of scholars who have "recognized the lack of any constitutional foundation for *Roe*." Clarke D. Forsythe and Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 Tex. Rev. Law. & Pol. 301, 313 (2006) [hereinafter Forsythe and Presser, *A Federalism Amendment*]. "Many renowned constitutional scholars—including Alexander Bickel, Archibald Cox, John Hart Ely, Philip Kurland, Richard Epstein, Mary Ann Glendon, Gerald Gunther, Robert Nagel, Michael Perry, and Harry Wellington—have recognized the lack of any constitutional foundation for *Roe*." *Id* at 313–14. The same authors also quote Justice Lewis Powell as referring to *Roe* and its companion case *Doe v. Bolton*, 410 U.S. 179 (1973) as "'the worst opinions I ever joined.'" Forsythe and Presser, *A Federalism Amendment*, *supra* at 315. *See also* Forsythe, *Draft Opinion*, *supra* at 458–72 (criticizing *Roe* including *Roe's* viability rule).

Professor Beck argues that "*Casey* did not rectify *Roe's* failure to justify the viability rule in constitutional terms." Beck, *Law of Precedent*, *supra* at 1463. "In attempting to justify the viability rule," Beck

explains, "the *Casey* plurality asserted that viability marks 'the independent existence of [a] second life' that 'can in reason and all fairness be the object of state protection that now overrides the rights of the woman.'" *Id.* However, "[t]his cryptic and conclusory justification left unaddressed a host of critical questions." *Id.*

B. The viability rule is unworkable, arbitrary, poorly reasoned, inadequate, and extreme.

Freed from the constraint of strict adherence to unworthy precedent, the Court enjoys an array of excellent reasons to abandon the viability rule.[4]

i. The viability rule is unworkable as a standard of regulation.

The viability rule is unworkable as a meaningful standard of regulation. In *Colautti v. Franklin*, 439 U.S. 379 (1979), this Court referred to "the uncertainty of the viability determination," *id.* at 395, explained that "different physicians equate viability with different probabilities of survival," *id.* at 396, and acknowledged that "the probability of any particular fetus' obtaining meaningful life outside the womb can be determined only with difficulty," *id.* *See* Beck, *State Interests*, *supra* at 37 (discussing *Colautti*).

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[4] With permission of the author, a counsel on this brief, this section of the brief draws heavily from Thomas M. Messner, *The Constitutional Viability of Five-Month Abortion Laws*, Charlotte Lozier Inst., Nov. 9, 2018.

Given these "uncertainties," the Court admitted, "it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability." *Id.* at 395.

For these reasons, the viability rule, at least in some cases, can be difficult if not impossible to enforce. As Professor Beck writes, although "all competent doctors should reach the same conclusion about the viability or nonviability of a particular fetus" in some circumstances, "[i]n cases nearer to the margin . . . two doctors might reasonably disagree about viability, just as they might disagree about the likely consequences of a particular medical treatment or the length of time a particular patient has to live." Randy Beck, *Overcoming Barriers to the Protection of Viable Fetuses*, 71 Wash. & Lee L. Rev. 1263, 1263 (2014).

ii. The viability rule is arbitrary. It can be influenced by factors such as race, access to treatment facilities, and even altitude.

In Professor Beck's view, "[t]he [v]iability [r]ule [i]s [a]rbitrary." Beck, *State Interests*, *supra* at 37.

Professor Beck finds that viability can be influenced by factors such as race, gender, whether the mother smokes, access to treatment facilities, and even the altitude of where the baby and mother live. *Id.* at 39–40.

Furthermore, "[d]ue to advances in neonatal care, the state may be able to protect a fetus from abortion today when, just a few years before, it would have been constitutionally disabled from protecting an identical fetus." *Id.* at 38–39. *See also Casey*, 505 U.S. at 860

("advances in neonatal care have advanced viability to a point somewhat earlier" than assumed at the time of *Roe*). In 1973, the *Roe* Court, while recognizing it "may occur earlier," stated that viability was "usually placed" at about seven months or 28 weeks. *Roe* 410 U.S. at 160. Just four decades later, in 2013, a federal district court recognized that "23 to 24 weeks gestational age is, on average, the attainment of viability." *Isaacson v. Horne*, 884 F. Supp. 2d 961, 968 (D. Ariz. 2012), *rev'd*, 716 F.3d 1213 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014).

iii. The viability rule is poorly reasoned.

Professor Beck finds that "scholars from a wide variety of backgrounds have recognized" that "*Roe* literally provided no argument in favor of treating viability as the controlling line, much less an argument grounded in constitutional principles." Randy Beck, *Gonzales, Casey, and the Viability Rule*, 103 Nw. U.L. Rev. 249, 267 (2009) [hereinafter Beck, *Viability*]. *See also supra*, Section III.A.iii. In Professor Beck's own analysis, "[t]he Court has never offered an adequate constitutional justification for the viability rule." Beck, *State Interests*, *supra* at 32. *See also* Beck, *Viability*, *supra* at 280 (asserting that "[t]o date, the Court has failed to offer any theory showing why the Constitution prevents a legislature from protecting fetal life until the fetus can survive outside the womb").

Professor Beck further argues that "the Court has not grappled with the duration of abortion rights in a case where the answer mattered to the outcome." Beck, *State Interests*, *supra* at 33. *See* Randy Beck, *Self-Conscious Dicta: The Origins of Roe v. Wade's*

Trimester Framework, 51 Am. J. Legal Hist. 505, 513–26 (2011). According to Professor Beck, *Roe* and *Casey* involved review of laws that applied from the outset of pregnancy meaning that neither case turned on the duration of the abortion right. *See supra*, Section III.A.i. Professor Beck also finds that the parties in *Roe* and *Casey* did not brief arguments for and against the viability rule. *See supra*, Section III.A.ii.

iv. The viability rule is inadequate.

In his opinion dissenting from "the decision, the reasoning, and the judgment" of the Court in *Stenberg v. Carhart*, 530 U.S. 914, 979 (2000) (Kennedy, J., dissenting), Justice Kennedy set out three important principles respecting the role of state legislatures in regulating abortion. *See* Beck, *State Interests*, *supra* at 50 (Justice Kennedy's dissent in *Stenberg* "recognized the important role state legislatures play in mediating societal divisions over abortion").

First, "[w]hen the [*Casey*] Court reaffirmed the essential holding of *Roe*, a central premise was that the States retain a critical and legitimate role in legislating on the subject of abortion, as limited by the woman's right the Court restated and again guaranteed." *Stenberg*, 530 U.S. at 956–57 (Kennedy, J., dissenting).

Second, "[t]he political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential." *Id.* at 957.

Third, "[t]he State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of

some degree of consensus." *Id. Accord. Doe v. Bolton*, 410 U.S. 179, 191 (1973) (referring to the right of the State "to readjust its views and emphases in the light of the advanced knowledge and techniques of the day").

In the light of these principles, the viability rule is inadequate if it automatically precludes, without any further consideration, legislative efforts such as Indiana's to address modern issues such as Down syndrome discrimination abortion.

v. The viability rule is extreme compared with domestic opinion and international norms.

Professor Beck also argues that "[t]he [v]iability [r]ule [i]s [e]xtreme." Beck, *State Interests*, *supra* at 40.

The viability rule is extreme compared with public opinion in the United States. According to a May 2018 Gallup poll, 81% of those surveyed believed that abortion should be illegal in the last three months of pregnancy and 65% believed abortion should be illegal in the second trimester. The Gallup Org., *Topics A-Z: Abortion* (May 1-10, 2018), https://news.gallup.com/poll/1576/abortion.aspx.

The viability rule is also extreme compared to international norms. A 2014 study published by the Charlotte Lozier Institute found that the United States is one of only seven countries worldwide that permit elective abortion past 20 weeks. Angelina Baglini, *Gestational Limits on Abortion in the United States Compared to International Norms*, Charlotte Lozier Inst. (Feb. 24, 2014) http://lozierinstitute.org/internationalabortionnorms. This study puts the U.S.

in the top 5% of most permissive countries on abortion out of 198 countries analyzed. *Id.*

CONCLUSION

Amicus urges the Court to grant the petition and uphold Indiana's protections for unborn children with Down syndrome. If the Court denies review of the Down syndrome protections at issue in this case, *Amicus* submits that lower courts and future litigants would greatly benefit from an accompanying statement clarifying that whether the U.S. Constitution bars such protections presents a question of first impression under this Court's abortion precedents.

Respectfully submitted,

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No. 18-483

In the Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA DEPARTMENT OF HEALTH, ET AL., PETITIONERS,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF WISCONSIN, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a State may mandate the respectful disposition of the remains of aborted "child[ren] assuming the human form," *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007).

2. Whether a State may ban the invidiously discriminatory practice of aborting unborn children solely because of their race, sex, or disability diagnosis.

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INTEREST OF *AMICI CURIAE*

Amici are the States of Wisconsin, Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Governor Phil Bryant of the State of Mississippi (hereinafter "the States"). The States have the solemn duty and sovereign right to protect the dignity of all human beings within their borders. Through House Enrolled Act 1337 ("HEA 1337" or "the Act"), Indiana forwarded this and other important sovereign interests by requiring the respectful disposition of the remains of unborn children and prohibiting the discriminatory elimination of classes of human beings based upon race, gender, or disability. App. 131a–36a. Many "[o]ther states have followed Indiana's lead" by enacting laws similar to HEA 1337. App. 31a (Manion, J., concurring in the judgment in part, dissenting in part); *e.g.*, Ariz. Rev. Stat. § 13-3603.02; Ark. Code § 20-16-1904; Kan. Stat. § 65-6726; La. Rev. Stat. § 40:1061.1.2; N.C. Gen. Stat. § 90-21.121; N.D. Cent. Code § 14-02.1-04.1; Ohio Rev. Code § 2919.10; Okla. Stat. tit. 63, § 1-731.2(B); S.D. Codified Laws § 34-23A-64.

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* Counsel of record received timely notice of the States' intent to file this amicus brief at least ten days before the due date. Sup. Ct. R. 37.2(a). Pursuant to Supreme Court Rule 37.4, the consent of the parties is not required for the States to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Seventh Circuit's decision below contains two holdings that, especially when taken together, exhibit an unprecedented, unlawful hostility to the States' authority to honor human life and dignity.

The Seventh Circuit first held that Indiana had no constitutional authority to enact the Respectful-Disposition Provision, which requires providers to dispose respectfully of aborted unborn children, rather than dumping them as medical waste (as is Respondents' practice). Disregarding this Court's explanation in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 & n.45 (1983), *overruled on other grounds by Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and in direct conflict with the Eighth Circuit's holding in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479, 487–88 (8th Cir. 1990), the Seventh Circuit concluded that Indiana's "interest in requiring . . . dispos[al] of aborted fetuses in the same manner as human remains is not *legitimate*" because this Court has held that those unborn children are not "persons" under the Fourteenth Amendment. App. 15a–16a (emphasis added). The Seventh Circuit's unprecedented holding that unborn children are so unworthy of dignity that it is not even "legitimate" for the State to require that their remains not be thrown away like medical waste warrants this Court's review.

The Seventh Circuit also invalidated Indiana's Antidiscrimination Provision, which prohibits the elimination of classes of human beings through discriminatory abortion based upon race, gender, and disability because, in the Seventh Circuit's view, *Casey* foreclosed *any* prohibition on pre-viability abortions, no matter the interest being sought, no matter how carefully tailored the law. But the plaintiffs in *Casey* specifically declined to challenge Pennsylvania's discriminatory-abortion prohibition, and this Court, accordingly, did not rule upon that prohibition. *See* Br. for Respondents, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006423, at *4. Nevertheless, the Seventh Circuit concluded that *Casey* controlled the outcome in this case because, in the Seventh Circuit's view, *Casey* enshrined the right to pre-viability abortion as "categorical." But this Court has never declared *any* right to be "categorical," and *Casey* itself upheld one type of pre-viability abortion prohibition. Under a proper understanding of *Casey*'s undue-burden test, the Antidiscrimination Provision furthers the State's compelling interest in prohibiting the discriminatory elimination of classes of human beings by race, gender, or disability. This issue is ripe for this Court's review, as Judge Easterbrook, joined by Judges Sykes, Barrett and Brennan, explained below. App. 123a.

This Court should grant the Petition.

REASONS FOR GRANTING THE PETITION

I. The States May Require The Respectful Disposition Of The Remains Of Aborted Unborn Children

Indiana's Respectful-Disposition Provision requires an abortion clinic to "inter[ ] or cremate[ ]" the remains of any "aborted fetus" in its "possession." App. 136a. This ensures that the remains of unborn children receive the same dignified disposition as the remains of other human beings. *Compare* App. 136a, *with* Ind. Code §§ 23-14-54-1, -4. The Seventh Circuit invalidated Indiana's Provision, taking the remarkable position that "the State's interest in requiring . . . dispos[ition] of aborted fetuses in the same manner as human remains *is not legitimate*." App. 16a (emphasis added). Since that decision violates this Court's explanation in *Akron* and creates a division with the Eighth Circuit, this Court's review is warranted. *See* Sup. Ct. R. 10(a), (c).

A. In *Akron*, this Court considered the constitutionality of Akron's fetal-disposition ordinance, holding that the statute was unconstitutionally vague because of the statute's particular wording. 462 U.S. at 451–52. In articulating the narrow limits of this holding, however, this Court specifically explained that a State "remains free, of course, to enact [ ] carefully drawn regulations that further its *legitimate interest in proper disposal of fetal remains*." 462 U.S. at 452

n.45 (emphasis added). Most relevant here, this Court explained that a State may enact a statute that "preclude[s] the mindless dumping of aborted fetuses on garbage piles." *Id.* at 451 & n.44 (citing *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976) (mem.)).

Consistent with this Court's guidance in *Akron*, the Eighth Circuit in *Planned Parenthood of Minnesota*, 910 F.2d 479, upheld Minnesota's fetal-disposition statute, which ensured "the dignified and sanitary disposition of the remains of aborted [] human fetuses" by requiring all "medical facilities" to "provide for the disposal of the[se] remains" in their possession "by cremation, internment by burial, or in a manner directed by the commissioner of health." *Id.* at 481 n.2, 483 (quoting Minn. Stat. § 145.1621, subds. 1, 4); *compare* App. 136a (Indiana's Respectful-Disposition Provision). The Eighth Circuit held that the statute furthered the "legitimate interest in proper disposal of fetal remains" recognized by this Court in *Akron*. 910 F.2d at 482 (quoting *Akron*, 462 U.S. at 452 n.45). Since, as this Court has held, "a state may make a value judgment favoring childbirth over abortion," it must for the same reason be allowed to "conclu[de] that fetal remains are the equivalent of [born] human remains." *Id.* at 487 (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 505–06 (1989)); *accord Whole Woman's Health v. Smith*, 896 F.3d 362, 376 (5th Cir. 2018) (Ho, J., concurring) ("[N]othing in the text or original understanding of the Constitution prevents a state from requiring the proper burial of fetal remains.").

B. In the decision below, a divided panel majority invalidated Indiana's Respectful-Disposition Provision. That holding creates a direct split of authority with the Eighth Circuit's decision in *Planned Parenthood of Minnesota*, ignores this Court's explanation of the legitimate interests underlying respectful-disposition laws from *Akron*, and makes numerous other legal errors.

The divided panel's decision below conflicts directly with the Eighth Circuit's upholding of a materially indistinguishable respectful-disposition provision. Indiana's Provision requires that an abortion clinic "inter[ ] or cremate[ ]" any "aborted fetus" in its "possession," App. 136a, just like Minnesota's law that the Eighth Circuit upheld against an identical legal challenge, *see Planned Parenthood of Minn.*, 910 F.2d at 481 n.2. Applying rational-basis review, as all conceded was proper, App. 14a–15a, the panel majority nevertheless held that Indiana's interest in showing respect to the remains of unborn children was "not legitimate" because this Court "has concluded that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," App. 15a–17a (citation omitted), and that, even if Indiana's interest were legitimate, the law failed to pursue it through "rationally related" means, App. 18a–19a. That conclusion "create[s] a conflict with" the Eighth Circuit's decision in *Planned Parenthood of Minnesota*, App. 124a (Easterbrook, J., dissenting from the denial of rehearing en banc), given that the

Eighth Circuit held that fetal-disposition laws further legitimate purposes, *Planned Parenthood of Minn.*, 910 F.2d at 487–88; *supra* p. 5, and any one legitimate purpose is sufficient to sustain a law on rational-basis review, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Simply put, the Seventh Circuit split with the Eighth Circuit in a case that is "substantially similar in every material respect." App. 39a (Manion, J., concurring in the judgment in part, dissenting in part).

The panel majority's decision invalidating the Respectful-Disposition Provision similarly conflicts with this Court's explanation that a State "remains free, of course, to enact [ ] carefully drawn regulations that further its *legitimate interest in proper disposal of fetal remains.*" *Akron*, 462 U.S. at 452 n.45 (emphasis added). The panel majority *did not even discuss Akron*, relegating it to a "*see also*" cite. App. 17a. Instead, the panel majority claimed that its holding followed from this Court's decision in *Roe*, which had concluded that unborn children are not "persons" under the Fourteenth Amendment's Due Process Clause. App. 15a–16a (citing *Roe v. Wade*, 410 U.S. 113, 158–59 (1973)). From *Roe*, the panel majority derived the conclusion that Indiana's requirement that the remains of unborn children be disposed of in the same manner as the remains of other babies is "not legitimate." App. 15a–16a. But *Roe* predated *Akron* and, in any event, its holding on this score is a "red herring." App. 41a (Manion, J., concurring in the judgment in part, dissenting in

part). The question of who counts as a "person" under the Fourteenth Amendment is analytically distinct from the question of "whether the fetus is a 'human being'" in a scientific, moral, or philosophical sense. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting), *overruled in part by Casey*, 505 U.S. 833. Nothing prevents Indiana from reaching its own considered judgments on these questions. App. 41a–42a (Manion, J., concurring in the judgment in part, dissenting in part). Indeed, the sovereign authority of the States to make such judgments is precisely the reason why, under this Court's settled precedent, States may "make a value judgment favoring childbirth over abortion." *Webster*, 492 U.S. at 505–06 (citation omitted).

Far from being irrational, respect for unborn children as human beings is a well-recognized basis for legislative action. *Accord Gonzales*, 550 U.S. at 160 ("the fast-developing brain of her unborn child, a child assuming the human form"). The Federal Government and 38 States rely on that same judgment as the core justification for their fetal-homicide laws. *See* 18 U.S.C. § 1841; Ind. Code § 35-50-2-16; Wis. Stat. § 940.01(1)(b); *Fetal Homicide Laws*, Nat'l Conf. of State Legislatures, https://perma.cc/A7D3-SF3V (all links last visited Nov. 7, 2018). These laws have survived legal challenge time and again, App. 41a, with courts often rejecting arguments practically identical to the Seventh Circuit's wrongheaded reliance on *Roe*, *see*,

e.g., *Coleman v. DeWitt*, 282 F.3d 908, 911–13 (6th Cir. 2002). Additionally, the Federal Government bans the commercial sale of fetal tissue, 42 U.S.C. § 289g–2, and many States ban experimentation on fetal remains, *e.g.*, Ind. Code § 16-34-2-6; Ohio Rev. Code § 2919.14, all in recognition of the unborn child's humanity. And the "majority" of biologists define "human beings" to include the unborn, Patrick Lee, *Abortion & Unborn Human Life* 71–107 (2d ed. 2010), as do many eminent bioethicists, *e.g.*, John Finnis, *Abortion and Health Care Ethics*, *in* Bioethics: An Anthology 15 (Helga Kuhse et al. eds., 3d ed. 2016).

The Seventh Circuit's interference with the State's provision for the respectful disposition of human remains is also contrary to history. Society has long practiced the proper disposition of human remains as a sign of respect. *See, e.g.*, Homer, *The Iliad*, Book XXIV ("And Priam answered [Achilles], . . . 'Nine days, therefore, will we mourn Hector in my house; on the tenth day we will bury him . . . ; on the eleventh we will build a mound over his ashes . . . .'"). Performing a proper disposition has long been a duty owed to the deceased. *See, e.g.*, Sophocles, *Antigone*, Scene I, Line 413 ("Nevertheless, there are honors due all the dead."); 2 William Blackstone, *Commentaries*, *508 ("[The executor] must *bury* the deceased in a manner suitable to the estate which he leaves behind him."). A State enshrining this duty in the law, *see, e.g.*, Ind. Code §§ 23-14-54-1, -4, as an exercise of its police power, furthers the rational purpose of showing this type of respect, *see Barnes v. Glen Theatre, Inc.*,

501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation."); *accord Gonzales*, 550 U.S. at 137, 158 (banning of the "intact D&E" abortion procedure is "justif[ied]" because it "implicates additional ethical and moral concerns"). As this Court recognized in *Akron*, States have a "legitimate interest in proper disposal of fetal remains," 462 U.S. at 452 n.45, since they have an interest in the proper disposal of all human remains.

Finally, even if the Constitution somehow prohibited the States from requiring the treatment of unborn children as human beings for purposes of the respectful disposition of remains, this would still not render the Respectful-Disposition Provision unlawful under the rational-basis standard that all parties agree applies here. *See Beach Commc'ns*, 508 U.S. at 315 ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [law] actually motivated the legislature."). As Judge Easterbrook explained below, the States' "regulatory authority" extends well beyond human beings. App. 123a. States have, for example, ample authority to enact "animal-welfare statutes," including statutes that "prescribe how animals' remains must be handled." App. 123a; *accord Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, No. 17-71 (U.S. argued Oct. 1, 2018) (considering federal protections for the "dusky gopher frog"). In Judge Easterbrook's words, "[t]he panel has held invalid a

statute that would be sustained had it concerned the remains of cats or gerbils." App. 123a. This Court should grant review and correct this horrific consequence of the Seventh Circuit's decision.

II. The States May Prohibit The Elimination Of Classes Of Human Beings By Invidiously Discriminatory Abortions

Indiana's Antidiscrimination Provision prohibits the "eugenic" practice of doctors performing abortions sought solely because of the race, sex, or disability status of the unborn child. App. 121a (Easterbrook, J., dissenting from the denial of rehearing en banc); App. 132a–33a. The Seventh Circuit invalidated this law by purporting to find within this Court's case law a "*categorical*" right to pre-viability abortion, a right that a State cannot infringe no matter how powerful its interest, App. 10a (emphasis added), even if this Court has never confronted a case dealing with that interest, App. 121a–22a (Easterbrook, J., dissenting from the denial of rehearing en banc). That conclusion is legally wrong and would perversely place the unenumerated right to pre-viability abortion above even core protections of the Bill of Rights.

A. Whether a State's anti-discrimination interests justify the prohibition of discriminatory abortions is an issue that this Court has never addressed. In *Casey*, the challengers "sought declaratory and injunctive relief against a wide array of

[Pennsylvania's] 1988 and 1989" abortion regulations, but did *not* seek to block Pennsylvania's prohibition of gender-discriminatory abortions, which Pennsylvania enacted during the same period. *See* Br. for Respondents, *Casey*, 505 U.S. 833, 1992 WL 12006423, at *4.

Failing to recognize this as an issue of first impression, the Seventh Circuit concluded that certain language in *Casey* enshrined the pre-viability abortion right as "categorical," preemptively foreclosing any anti-eugenics prohibitions on pre-viability abortions. App. 10a. In reaching this conclusion, the Seventh Circuit relied on a single passage from *Casey*: "'a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.'" App. 10a (quoting *Casey*, 505 U.S. at 879 (plurality op.)). The Seventh Circuit read this passage as mandating the conclusion that *every effort* by the State to prohibit any pre-viability abortion is automatically unconstitutional, without any need to even consider either the weight of the State's proffered interest or how narrowly tailored the law is to achieving that interest. App. 13a–14a.

The Seventh Circuit's interpretation of this passage from *Casey* is incorrect. As Judge Easterbrook explained below, the passage has no bearing on the Antidiscrimination Provision because *Casey* "did not consider the validity of an anti-eugenics law." App. 121a. "Judicial opinions are not

statutes; they resolve only the situations presented for decision." App. 121a. The passage is best understood as limited to only "the State's interests" *actually urged* before this Court in *Casey*—the State's general interest in unborn life and the health of the mother. *See Casey*, 505 U.S. at 846; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). And since "[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay statutes *Casey* considered," the lower courts "ought not impute" a decision on that question to this Court. App. 122a (Easterbrook, J., dissenting from the denial of rehearing en banc). In short, "*[n]one* of th[is] Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." App. 122a (Easterbrook, J., dissenting from the denial of rehearing en banc) (emphasis added).

No other passages in *Casey* support the Seventh Circuit's conclusion. So, for example, while Judge Manion believed that the label "undue burden" suggests a "pure effects test," blind to any compelling interests of the State, App. 26a, this label was a "shorthand" for a traditional means-ends test—albeit one specifically fashioned for the abortion context. *Casey*, 505 U.S at 876–77 (plurality op.). Thus, the test calls for weighing the State's "interest[s]" against the "burdens on the right to decide whether to terminate a pregnancy." *Id.* at 876.

Casey itself rejects the extreme "categorical" position that the Seventh Circuit ascribes to it. *Casey* held that the State *could* prohibit some pre-viability abortions, namely, those of a minor when her parents do not consent and a court finds both that the abortion is not in the minor's best interests and that the minor is not "mature and capable of giving informed consent." 505 U.S. at 899 (plurality op.). That prohibition is justified not by the State's interest in the life of the unborn child or the health of the mother, but by its "strong and legitimate interest in the welfare of its young citizens." *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990). Had *Casey* elevated the right to a pre-viability abortion to "categorical" status, as the Seventh Circuit believed, this restriction would have fallen. Put another way, since this Court in *Casey* concluded that the State's interest in youngsters' welfare is sufficiently powerful to prohibit some pre-viability abortions, it follows that courts must consider the possibility that other interests might justify the prohibition of other such abortions.

The Seventh Circuit also misunderstood *Casey*'s broader place within the development of this Court's abortion jurisprudence. *Casey*'s undue-burden standard replaced the post-*Roe* strict-scrutiny test, which had developed as part of *Roe*'s trimester framework, to make it *easier* for States to regulate abortions. *See Casey*, 505 U.S. at 871–73 (plurality op.); *e.g.*, *Akron*, 462 U.S. at 427, 434. The *Casey* plurality found this shift justified because *Roe* had "undervalue[d] the State's interest." *Casey*, 505 U.S.

at 873 (plurality op.). To make the undue-burden test "*more difficult* to satisfy" than *Roe*'s "strict-scrutiny test," as the Seventh Circuit did in this case, would be an "absurd result[ ]." App. 24a (Manion, J., concurring in the judgment in part, dissenting in part).

More generally, this Court has never declared any right in the Constitution to be absolute, so the Seventh Circuit's enshrining of the right to a pre-viability abortion as "categorical" cannot be correct. Even assuming that pre-viability abortion is a right on par with core constitutional rights like free speech or equal protection—a doubtful proposition—"[n]o fundamental right . . . is absolute." *McDonald v. City of Chicago*, 561 U.S. 742, 802 (2010) (Scalia, J., concurring). "[E]ven the fundamental rights of the Bill of Rights are not absolute." *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949); *Virginia v. Black*, 538 U.S. 343, 358 (2003). Accordingly, "the strength of the individual's liberty interests and the State's regulatory interests must *always* be assessed and compared" when evaluating a law's constitutionality. *McDonald*, 561 U.S. at 879 (Stevens, J., dissenting) (emphasis added). For example, the First Amendment provides in categorical terms that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press," U.S. Const. amend. I, but it recognizes "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have

never been thought to raise any Constitutional problem," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). The First Amendment also permits the States to prohibit even fully protected political speech where it satisfies strict scrutiny. *See, e.g., Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015). Moving beyond the Bill of Rights, the Fourteenth Amendment's Equal Protection Clause provides, without qualification, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Yet, as this Court has explained, a State may even use racial classifications where it satisfies strict scrutiny; for example, to prevent prison riots, *see Johnson v. California*, 543 U.S. 499, 512–14 (2005), or to comply with the Voting Rights Act, *see Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800–02 (2017). It is unthinkable that *Casey* endowed the unenumerated right to pre-viability abortion with greater status than enumerated rights like the freedom of speech or the freedom from state-sponsored racial classification.

While the Seventh Circuit's interpretation of *Casey* wrongly "impute[s] to [this Court] decisions [it has] not made about problems [it has] not faced," App. 122a (Easterbrook, J., dissenting from the denial of rehearing en banc), if *Casey*'s "broad dicta" is causing the lower courts to err, that is reason enough for review here, *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009). It is this Court's role to reevaluate periodically the soundness of the

statements in its decisions, *Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298, 311 (2012) ("[*Abood*] is an anomaly."), and, if it finds that precedent flawed, *Harris v. Quinn*, 134 S. Ct. 2618, 2638 (2014) ("*Abood*[ ] [has] questionable foundations"), to reconsider it, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018) ("*Abood* is [ ] overruled.").

B. The correct understanding of *Casey*'s undue-burden standard is that it balances the burdens imposed by the law, on the one hand, with the gravity of the state interest that the law furthers, on the other. The exactness required in this balancing is a sliding-scale level of inquiry—ranging from rigorous to permissive, based upon how substantial the law's level of interference with the right to abortion, if any. *See Gonzales*, 550 U.S. at 146. Put another way, "*Casey*'s undue-burden test [is a] right-specific test on the spectrum between rational-basis and strict-scrutiny review." *Whole Woman's Health*, 136 S. Ct. at 2327 (Thomas, J., dissenting). It is a means-end balancing test of the type this Court applies in countless other contexts. So, when reviewing an abortion law under the undue-burden standard—no matter how rigorously calibrated—a court must consider both "the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309.

Assuming, *arguendo*, that the most stringent form of scrutiny applies to Indiana's Antidiscrimination

Provision, the Provision satisfies such scrutiny. *See* App. 21a (Manion, J., concurring in the judgment in part, dissenting in part). Antidiscrimination Provisions like Indiana's seek to prohibit an invidiously discriminatory practice that violates the Nation's most core commitments: eliminating the "targeting" of individuals for disfavored treatment "because of [their] immutable human characteristics" like race, sex, or disability. App. 23a (Manion, J., concurring in the judgment in part, dissenting in part). Such laws further the most compelling of government interests, and "it is hard to imagine legislation more narrowly tailored to promote this interest." App. 35a (Manion, J., concurring in the judgment in part, dissenting in part); *see Washington v. Glucksberg*, 521 U.S. 702, 728–29 (1997).

That States have a compelling interest in stopping such discriminatory practices follows from the logic underlying this country's legal protections against private discrimination. This Court has held, for example, that States have a "compelling interest in eliminating discrimination against women," even where antidiscrimination laws conflict with First Amendment associational values. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see, e.g.*, Wis. Stat. § 106.52. Similarly, both Congress and the States may prohibit the "moral and social wrong" of discrimination by private parties in public accommodations. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964); *e.g.*,

Wis. Stat. § 106.52, and in other areas, *see Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). And both Congress and the States have legislated to forbid discrimination against disabled individuals, including by enacting laws such as the Americans With Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987); *e.g.*, Wis. Stat. § 111.321. Given that stopping private discrimination based upon gender, race, or disability—in areas as diverse as public accommodations, employment, and organization membership—is a "compelling" state interest, *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988), the state interest in stopping the *elimination* of classes of people based on these same characteristics is even *more* compelling. Surely a State that has the constitutional authority to protect members of the Down syndrome community from being discriminated against in employment or public accommodations can protect that same community from wholesale elimination by eugenic practices.

The evil that the Antidiscrimination Provision seeks to combat is quite serious. Iceland is a canary in the coal mine. "[T]he vast majority of women [in Iceland]—close to 100 percent—who receive[ ] a positive test for Down syndrome terminate[ ] their pregnancy." Julian Quinones & Arijeta Lajka, *"What kind of society do you want to live in?": Inside the country where Down syndrome is disappearing*, CBS News (Aug. 14, 2017), https://perma.cc/A5P4-8KBX.

Nor is Iceland alone, as the "estimated termination rate" of unborn children with Down syndrome is 98 percent in Denmark. *Id.* Such countries "are now celebrating the 'eradication' of Down syndrome" by eliminating virtually *all* unborn children diagnosed with this condition *in utero*. App. 33a (Manion, J., concurring in the judgment in part, dissenting in part).

In Asia, "widespread sex-selective abortion" has caused "disastrous effects." App. 32a n.5 (Manion, J., concurring in the judgment in part, dissenting in part). Some experts have concluded that this continent has 100 to 160 *million* "missing" women. *See* Mara Hvistendahl, *Unnatural Selection: Choosing Boys over Girls, and the Consequences of a World Full of Men* 5–12 (2011). In India, "[o]ver the course of several decades, 300,000 to 700,000 female fetuses were selectively aborted [ ] each year." Sital Kalantry, *How to Fix India's Sex-Selection Problem*, N.Y. Times (Jul. 27, 2017), https://perma.cc/B4UN-UDX3; *accord* Nicholas Eberstadt, *The Global War Against Baby Girls*, The New Atlantis (2011), https://perma.cc/ZCM9-MU3K (documenting similar phenomenon in China, South Korea, and other countries). This male favoring "is a symptom of pervasive social, cultural, political and economic injustices against women, and a manifest violation of women's human rights." *Sex Imbalances at Birth: Current Trends, Consequences, and Policy Implications*, U.N. Population Fund Asia & Pacific Regional Office (Aug. 2012), https://perma.cc/Y6CB-

GCK2; *Gender-Biased Sex Selection*, U.N. Population Fund, https://perma.cc/KCT4-6T23?type=image. And it causes social disruption as the generations mature. "[F]eminists in Asia worry that as women become scarce, they will be pressured into taking on domestic roles and becoming housewives and mothers rather than scientists and entrepreneurs." Mara Hvistendahl, *Where Have All the Girls Gone?*, Foreign Policy (June 27, 2011), https://perma.cc/2735-FQD6; *accord* Simon Denyer & Annie Gowen, *Too Many Men*, The Washington Post (Apr. 24, 2018), https://perma.cc/2U6J-WC8G.

The United States is not immune from these evil practices; indeed, the *casus belli* of this lawsuit is Respondents' unabashed desire to assist in such discrimination. *E.g.*, App. 5a. According to the best available estimates, 50 percent or more of pregnant women in the United States who learn that their child will be born with Down syndrome eliminate that child by abortion. Dist. Ct. Dkt. 54-2:13; *see also, e.g.*, Jamie L. Natoli et al., *Prenatal diagnosis of Down syndrome: a systematic review of termination rates (1995–2011)*, 32 Prenat. Diagn. 142, 142 (2012) (between 61% and 93%), https://perma.cc/4JDV-R69B. This practice has reduced the Down syndrome community by 30 percent, Gert de Graaf et al., *Estimates of the Live Births, Natural Losses, and Elective Terminations with Down Syndrome in the United States*, 167A(4) Am. J. Medical Genetics 756–67 (2015), https://perma.cc/A9VT-33V5, and the loss may be expected to grow as the availability of early

prenatal screening increases, *see* Rachèl V. van Schendel et al., *What Do Parents of Children with Down Syndrome Think about Non-Invasive Prenatal Testing (NIPT)?*, 26 J. Genetic Counseling 522 (2017), https://perma.cc/D8YE-WQYU. This discriminatory practice is partly due, no doubt, to the pressure that some women experience from doctors to abort unborn children with Down syndrome. Dist. Ct. Dkt. 54-1:6; *see, e.g.*, Hannah Korkow-Moradi et al., *Common Factors Contributing to the Adjustment Process of Mothers of Children Diagnosed with Down Syndrome: A Qualitative Study*, 28 J. Fam. Psychotherapy 193, 197 (2017); Briana S. Nelson Goff et al., *Receiving the Initial Down Syndrome Diagnosis: A Comparison of Prenatal and Postnatal Parent Group Experiences*, 51 Intellectual & Developmental Disabilities 446, 455 (2013). For example, mothers of children with Down syndrome "commonly express[ ]" that the medical information they receive in prenatal counseling is "biased or overly negative." Gregory Kellogg et al., *Attitudes of Mothers of Children with Down Syndrome Towards Noninvasive Prenatal Testing*, 23 J. Genetic Counseling 805, 810 (2014), https://perma.cc/TG3Z-8387. This bias takes the form of the "subtle shading of information by counselors against persons with Down syndrome," Arthur L. Caplan, *Chloe's Law: A Powerful Legislative Movement Challenging a Core Ethical Norm of Genetic Testing*, 13 PLoS Biol. 1, 2 (2015), https://perma.cc/A92V-CYGQ, or even open advocacy for the "eradication" of Down syndrome via "widespread acceptance of selective termination" of unborn children with the condition, David A. Savitz,

How Far Can Prenatal Screening Go in Preventing Birth Defects, 152 J. Pediatrics 3, 3 (2008), https://perma.cc/HP2Q-JNKH (also calling this "a desirable and attainable goal").

Sex-selective abortions are common in some communities in the United States. *See* Douglas Almond & Lena Edlund, *Son-biased sex ratios in the 2000 United States Census*, 105 Proc. of the Nat'l Acad. of Sci. 5861, 5861 (2008), https://perma.cc/F9X5-KWX6; Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data*, 1(2) Am. Econ. J.: Applied Econ. 1–34 (2009), https://perma.cc/KXJ9-2XW8. A recent Gallup survey confirms that the longstanding "tendency for American adults to express overall preferences for a boy over a girl" persists today. Frank Newport, *Slight Preference for Having Boy Children Persists in U.S.*, Gallup (July 5, 2018), https://perma.cc/36SP-AYW2 (noting that this bias towards boys is greater for "Americans aged 18 to 29"). As reported in The New York Times, a physician described her experience with this bias in patients that are pregnant with their third child: "'If it's a boy, they keep it. If it's a girl, they'll abort.'" Sam Roberts, *U.S. Births Hint at Bias for Boys in Some Asians*, N.Y. Times (June 14, 2009), https://perma.cc/5RL8-3D8D. As with discriminatory abortions based on disability status, the negative effects of sex-selective abortions may only be expected to grow in the future: "[a]s the ability to . . . create 'designer babies' with specified characteristics [like sex] becomes more of a reality,"

the bias toward children of a certain sex could even more directly affect fertility patterns. Newport, *supra*.

The State combating this invidious discrimination by enacting its nondiscrimination interests into law sends a powerful signal to members of minority communities that it is "inhumane" to terminate them, thereby affirming the "profound respect" that the State holds for all people. *See Gonzales*, 550 U.S. at 157 (citation omitted). As Frank Stephens, a disability-rights activist who himself has Down syndrome, powerfully testified before Congress, "a notion is being sold that maybe we don't need to continue to do research concerning Down syndrome. Why? Because there are pre-natal screens that will identify Down syndrome in the womb, and we can just terminate those pregnancies." Frank Stephens, Testimony Before House Subcommittee on Labor, Health and Human Services, and Education 1 (Oct. 25, 2017), https://perma.cc/S73U-GYKS. Recent efforts to "eliminate" Down syndrome are nothing more than "people pushing [a] particular 'final solution' [ ] that people [with Down syndrome] should not exist. They are saying that [people with Down syndrome] have too little value to exist." *Id.* By enacting laws like Indiana's Antidiscrimination Provision, the State affirms Mr. Stephens' poignant claim that those like him are equal human beings. *Id.* These laws thus advance the vital cause of demonstrating to society that *all* human beings—

including women, racial minorities, and those with disabilities—have lives "worth living."

Finally, that Indiana's Antidiscrimination Provision includes pre-viability abortions does not affect its constitutionality because the State's interests do not correspond to the unborn child's stage of development. In the traditional abortion-regulation context, this Court has held that the State's interest in protecting an unborn child's life is "not strong enough" to prohibit a pre-viability abortion. *See Casey*, 505 U.S. at 846, 860. The logic is that the more developed the unborn child, the stronger the State's interest in keeping that child alive. *Id.* This reasoning has no applicability where the strength of the State's interests does not correspond to the unborn child's stage of development. The State's interest is the prevention of the discriminatory elimination of classes of human beings; it makes no difference from the point of view of that interest if unborn children with Down syndrome are systematically eliminated at 10 weeks or 25 weeks, if the result is the same. Genetic screening for Down syndrome now regularly occurs "as early as 10 weeks" into the pregnancy, well before the unborn child is viable. *See* Nat'l Down Syndrome Soc'y, *Understanding a Diagnosis of Down Syndrome*, https://perma.cc/249P-5FD3; *accord* van Schendel, *supra*, at 525. So to prohibit effectively the discriminatory elimination of this class of society, the Provision must operate pre-viability.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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